No. 95-891-CSY Title: Ohio, Petitioner
v.
Robert D. Robinette

Docketed: December 7, 1995 Court: Supreme Court of Ohio

Entry	Date	Proceedings and Orders
	Dec 5 1995	Petition for writ of certiorari filed. (Response due February 5, 1996)
	Dec 22 1995	Order extending time to file response to petition until February 5, 1996.
	Jan 11 1996	Brief amici curiae of Arizona, et al. filed.
	Feb 1 1996	Brief of respondent Robert Robinette in opposition filed.
	Feb 14 1996	DISTRIBUTED. March 1, 1996
	Feb 20 1996	Reply brief of petitioner Ohio filed.
	Mar 4 1996	Petition GRANTED. SET FOR ARGUMENT October 8, 1996. **********
	Apr 9 1996	Order extending time to file brief of petitioner on the merits until April 30, 1996.
	Apr 10 1996	Motion of Americans for Effective Law Enforcement for leave to file a brief as amicus curiae filed.
	Apr 22 1996	Motion of Americans for Effective Law Enforcement for leave to file a brief as amicus curiae GRANTED.
	Apr 30 1996	Brief of petitioner Ohio filed.
	Apr 30 1996	Joint appendix filed.
	Apr 30 1996	Brief amicus curiae of United States filed.
	Apr 30 1996	Brief amici curiae of Alabama, et al. filed.
	May 23 1996	Order extending time to file brief of respondent on the merits until June 10, 1996.
	May 29 1996	Brief amicus curiae of Ohio Association of Criminal Defense Lawyers filed.
	May 31 1996	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 6 1996	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jun 6 1996	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jun 10 1996	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jun 10 1996	Brief of respondent Robert D. Robinette filed.
	Jul 10 1996	Reply brief of petitioner filed.
	Jul 26 1996	Record filed.
	Jul 29 1996	Record filed.
	Aug 14 1996	CIRCULATED.
	Oct 8 1996	ARGUED.

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES POLICE OFFICERS TO INFORM MOTORISTS, LAWFULLY STOPPED FOR TRAFFIC VIOLATIONS, THAT THE LEGAL DETENTION HAS CONCLUDED BEFORE ANY SUBSEQUENT INTERROGATION OR SEARCH WILL BE FOUND TO BE CONSENSUAL?

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The Decision and Opinion of the Court Of Appeals Of Montgomery County, Ohio Second Appellate District, filed April 15, 1994, is unreported and is reproduced at App. 15.

The Decision and Order of the Common Pleas Court Of Montgomery County, Ohio, filed March 8, 1993, in Case No. 92-CR-2800 is unreported and is reproduced at App. 24.

JURISDICTIONAL STATEMENT

The Opinion of the Ohio Supreme Court was entered on September 6, 1995. (App. 1). Jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The issue in this case is whether the aura of police authority is so great that the driver of a car, stopped for a traffic violation, remains seized after the completion of the business of the stop, unless the officer informs the motorist that he, or she, is free to go. The Ohio Supreme Court has held that absent such a recitation, a motorist's consent to answer questions or to allow a search, will always be deemed to be coerced.

On August 3, 1993 Deputy Roger Newsome of the Montgomery County Sheriff's Office in Dayton, Ohio, stopped Robert Robinette for driving 69 miles per hour in a 45 mile per hour construction zone on Interstate Route 70. Deputy Newsome was part of a drug interdiction project, and he testified that he routinely asked permission to search the cars he had stopped for speeding violations. After giving Robinette an oral warning about his speed, Newsome returned Robinette's license, and asked him if he had any drugs or contraband in the car.

Robinette told Newsome that he did not have anything illegal in his car. Deputy Newsome then asked Robinette if he could search the car. Robinette agreed. Deputy Newsome found illegal narcotics in the car. (Most of the encounter between Robinette and Newsome was videotaped by Newsome, using a stationary camera.) Robinette was subsequently charged with the crime of

Drug Abuse in violation of Ohio Revised Code 2925.11, a felony of the fourth degree.

Robinette's attorney filed a motion to suppress the evidence arguing that Newsome's actions violated the Fourth Amendment. (Copy of Motion attached at App. 27). After an evidentiary hearing at which the videotape was admitted, the trial court overruled Robinette's motion to suppress and held that, under the totality of the circumstances, his Fourth Amendment rights were not violated. The court cited *United States* v. *Mendenhall*, 466 U.S. 544 (1980). The trial court went on to reject Robinette's claim that he was unaware that he could refuse the officer's request to search, stating:

> Although the Constitution does not require proof of knowledge of a right to refuse as the sine-qua-non of an effective consent to search . . . such knowledge was highly relevant to the determination that there had been consent. *Mendenhall*, supra. In the instant case, again, however, the videotape belies this claim. The manner of inquiry, the phrasing of the request and the position of the parties eliminates the suggestion of overbearance by the officer.

Robinette then entered a no-contest plea and was found guilty by the court. He appealed to the Ohio Second District Court of Appeals, which reversed the trial court, ruling that the search of the vehicle resulted from an unlawful detention.

In a 4-3 decision, the Ohio Supreme Court affirmed the Court of Appeals, and in so doing, created a bright

line test to be applied in certain Fourth Amendment contexts:

> The right, guaranteed by the federal and Ohio constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase, "At this time you legally are free to go" or by words of similar import.

This language found in the Court's Second Syllabus, is the holding of the case. Rule I, Ohio Supreme Court Rules for the Reporting of Opinions.

The State of Ohio asks this Court to review the ruling of the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

The Ohio Supreme Court has held below that in certain Fourth Amendment contexts, the question of whether the encounter is consensual or coerced is not to be determined by the totality of the circumstances. Instead, the encounter will be deemed coercive unless the law enforcement officer has informed the citizen that he or she, is free to go. The decision of the Ohio Supreme Court directly contradicts over twenty years of federal Constitutional jurisprudence. Whether contact by a police officer is consensual or is compelled cannot be determined by any single fact, and the Ohio Supreme Court errs in holding to the contrary.

This Court has consistently rejected attempts to import "bright line" standards to Fourth Amendment analysis. In case after case, in various aspects of Fourth Amendment review, this Court has refused to find that any one factor is determinative in deciding whether consent is voluntarily given or compelled. In *Florida* v. *Bostick*, 501 U.S. 429 (1991), this Court rejected Florida's attempt to impose a per-se rule preventing law enforcement officers from contacting bus passengers to obtain consent to search for illegal narcotics unless the officer possessed reasonable suspicion of criminal activity. Likewise, in *Michigan* v. *Chesternut*, 486 U.S. 567 (1988), this Court rejected the Michigan Court of Appeals' "bright line" rule that investigatory pursuits were seizures. In *Florida* v. *Jimeno*, 500 U.S. 248 (1991), this Court rejected Florida's attempt to establish a per-se rule concerning the scope of a consensual search. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1972), rejected the Ninth Circuit Court of Appeals' determination that the government must establish, as the *sine-que-non* of an effective consent, that the subject of the search knew that he had a right to refuse. *United States* v. *Sharp*, 470 U.S. 675 (1985), rejected an attempt to impose an outer limit standard of twenty minutes for investigative stops.

Furthermore, this Court has rejected any attempt to require proof that a person in question was aware of his right not to co-operate: whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to

decline the officers' requests or otherwise terminate the encounter." *Bostick*, at 439.

In *Bustamonte*, this Court said that "neither this Court's prior cases, nor the traditional definition of "voluntariness" requires proof of knowledge of a right to refuse as the sine-que-non of an effective consent to a search." *Bustamonte*, at 234. In *United States* v. *Mendenhall*, 446 U.S. 544 (1980), Justice Stewart wrote, that: "[o]ur conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed." Id. at 555.

Other jurisdictions that have faced the issue have not abandoned the totality of the circumstances. In *United States* v. *Werking*, 915 F.2d 1404 (10th Cir 1990), the court was faced with facts that are nearly identical to the facts of this case. The officer stopped Werking for a traffic violation, returned his papers to him, then asked him "if he was transporting firearms, narcotics, or large sums of money in the vehicle". Werking replied that he was not. Werking then agreed to allow the officer to look in the trunk of his car. Inside was seventy-five pounds of marijuana. Id. at 1407. The Tenth Circuit looked to the totality of the circumstances and found that the consent to search was voluntarily given. Id. at 1409. See also *United States* v. *Turner*, 928 F.2d 956 (10th Cir. 1991) cert. denied 502 U.S. 881 (1991); *United States* v. *Fernandez*, 18 F.3d 874 (10th Cir. 1994); *United States* v. *Rivera*, 906 F.2d 319 (7th Cir. 1990).

Ohio's bright line requirement would place people validly stopped for criminal violations in a superior position than those who have committed no violation. It would require police to inform a traffic detainee that he or she was free to decline the police's requests and terminate the encounter, but not to so inform those who have done nothing wrong.

This Court should grant review to specifically reject the Ohio Supreme Court's imposition of a bright line single factor test which conflicts with years of federal constitutional jurisprudence and leads to absurd results. This Court should grant the State of Ohio's Petition For Writ of Certiorari to reaffirm that when determining whether an encounter is consensual or coerced, the Fourth Amendment requires a review of all the circumstances, not an isolated fact.

CONCLUSION

Wherefore, for the above reasons, certiorari should be granted.

Respectfully submitted,

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December 5, 1995

THE STATE OF OHIO, APPELLANT, *v.*
ROBINETTE, APPELLEE.

[Cite as *State v. Robinette* (1995),
73 Ohio St.3d 650.]

Criminal law – Motor vehicles – Continued detention of a person stopped for a traffic violation constitutes on illegal seizure, when – Police officer required to inform motorist that his legal detention has concluded before the police officer may engage in any consensual interrogation.

1. When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.

See: West's Ohio Digest, Automobiles 349(10, 17).

2. The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

See: West's Ohio Digest, Automobiles 349(18).

(No. 94-1143 – Submitted May 24, 1995 –
Decided September 6, 1995.)

APPEAL from the Court of Appeals for
Montgomery County, No. 14074.

On August 3, 1992, appellee, Robert D. Robinette, was driving his car at sixty-nine miles per hour in a forty-five miles per hour construction zone on Interstate 70 in Montgomery County. Deputy Roger Newsome of the Montgomery County Sheriff's office, who was on drug interdiction patrol at the time, stopped Robinette for a speeding violation.

Before Newsome approached Robinette's vehicle, he had decided to issue Robinette only a verbal warning, as was his routine practice regarding speeders in that particular construction zone. Newsome approached Robinette's vehicle and requested Robinette's driver's license. Robinette supplied the deputy with his driver's license, and Newsome returned to his vehicle to check it. Finding no violations, Newsome returned to Robinette's vehicle. At that point, Newsome had no intention of issuing Robinette a speeding ticket. Still, Newsome asked Robinette to get out of his car and step to the rear of the vehicle. Robinette complied with Newsome's request and stood between his car and the deputy's cruiser. Newsome returned to his vehicle in order to activate the cruiser's video camera so that he could videotape his interaction with Robinette. Newsome returned to Robinette, issued a verbal warning regarding Robinette's speed, and returned Robinette's driver's license.

After returning the license, Newsome said to Robinette, "One question before you get gone [*sic*]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Newsome testified that as part of the drug interdiction project he routinely asked permission to search the cars be

stopped for speeding violations. When Robinette said that he did not have any contraband in the car, Newsome asked if he could search the vehicle. Robinette testified that he was shocked at the question and "automatically" answered "yes" to the deputy's request. Robinette testified further that he did not believe that he was at liberty to refuse the deputy's request.

Upon his search of Robinette's vehicle, Newsome found a small amount of marijuana. Newsome then put Robinette and his passenger in the back seat of the cruiser and continued the search. As a result of this extended search, Newsome found "some sort of pill" inside a film container. The pill was determined to be methylenedioxy methamphetamine ("MDMA") and was the basis for Robinette's subsequent arrest and charge for a violation of R.C. 2925.11(A).

Robinette's indictment was issued on December 18, 1992. On February 19, 1993, Robinette filed a motion to suppress the evidence found in the search of his vehicle. The trial court overruled the motion on March 8, 1993, finding that the deputy made clear to Robinette that the traffic matter was concluded before asking to search the vehicle. The court ruled that Robinette's consent did not result from any overbearing behavior on behalf of Newsome.

Robinette appealed. The Court of Appeals for Montgomery County reversed the trial court, holding that Robinette remained detained when the deputy asked to search the car, and since the purpose of the traffic stop had been accomplished prior to that point, the continuing

detention was unlawful and the ensuring consent was invalid.

This matter is before this court upon an allowance of a discretionary appeal.

Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, *Carley J. Ingram* and *Michael L. Gebhart*, Assistant Prosecuting Attorneys, for appellant.

James D. Ruppert, for appellee.

Betty D. Montgomery, Attorney General, *Richard A. Cordray*, State Solicitor, and *Simon B. Karas*, Deputy Chief Counsel, urging reversal for *amicus curiae*, Ohio Attorney General.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *William E. Breyer*, Assistant Prosecuting Attorney, urging reversal for *amicus curiae*, Ohio Prosecuting Attorneys Association.

Pfeifer, J. The issue in this case is whether the evidence used against Robinette was obtained through a valid search. We find that the search was invalid since it was the product of an unlawful seizure. We also use this case to establish a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation.

In order to justify any investigative stop, a police officer "must be able to point to specific and articulable facts which, taken together with the rational inferences

from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906. Absent any additional articulable facts arising after the stop is made, the police officer must tailor his detention of the driver to the original purpose of the stop. *State v. Chatton* (1984), 11 Ohio St.3d 59, 63, 11 OBR 250, 253, 463 N.E.2d 1237, 1240.

In *Chatton*, the police officer stopped the defendant's car when he noticed it had no license plates. When he approached the car after it had pulled over, the officer saw a valid temporary tag in the car's rear window. Despite the fact that the original question which gave rise to the stop had been resolved, the officer approached the driver and asked to see his driver's license. A check of the license revealed that it was suspended, and the officer ordered the defendant out of his vehicle and placed him under arrest for driving with a suspended license. Upon searching the vehicle, the officer discovered a loaded revolver under the driver's seat. The defendant was charged with carrying a concealed weapon.

This court ruled in *Chatton* that the evidence resulting from the search should have been suppressed. This court reasoned that the officer, upon seeing the valid temporary tag, no longer maintained a reasonable suspicion that the defendant's vehicle was not properly licensed, and thus had no articulable reason to further detain the defendant to determine the validity of his driver's license. As a result, any evidence seized upon a subsequent search of the vehicle was inadmissible under the Fourth Amendment to the United States Constitution.

In this case, Newsome certainly had cause to pull over Robinette for speeding. The question is when the validity of that stop ceased. Newsome testified that from the outset he never intended to ticket Robinette for speeding. When Newsome returned to Robinette's car after checking Robinette's license, every aspect of the speeding violation had been investigated and resolved. All Newsome had to do was to issue his warning and return Robinette's driver's license.

Instead, for no reason related to the speeding violation, and based on no articulable facts, Newsome extended his detention of Robinette by ordering him out of the vehicle. Newsome retained Robinette's driver's license and told Robinette to stand in front of the cruiser. Newsome then returned to the cruiser and activated the video camera in order to record his questioning of Robinette regarding whether he was carrying any contraband in the vehicle.

When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure. *Chatton, supra.*

The entire chain of events, starting when Newsome had Robinette exit the car and stand within the field of the video camera, was related to the questioning of Robinette about carrying contraband. Newsome asked Robinette to step out of his car for the sole purpose of

conducting a line of questioning that was not related to the initial speeding stop and that was not based on any specific or articulable facts that would provide probable cause for the extension of the scope of the seizure of Robinette, his passenger and his car. Therefore the detention of Robinette ceased being legal when Newsome asked him to leave his vehicle.

However, this case contains a feature not discussed in *Chatton:* Robinette consented to the search of his vehicle during the illegal seizure. Because Robinette's consent was obtained during an illegal detention, his consent is invalid unless the state proves that the consent was not the product of the illegal detention but the result of an independent act of free will. *Florida v. Royer* (1983), 460 U.S. 491, 501, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229, 238. The burden is on the state to prove that the consent to search was voluntarily given. *Id.* at 497, 103 S.Ct. at 1324, 75 L.Ed.2d at 236. The factors used in consideration of whether the consent is sufficiently removed from the taint of the illegal seizure include the length of time between the illegal seizure and the subsequent search, the presence of intervening circumstances, and the purpose and flagrancy of the circumstances. *United States v. Richardson* (C.A.6, 1991), 949 F.2d 851, 858.

In this case there was no time lapse between the illegal detention and the request to search, nor were there any circumstances that might have served to break or weaken the connection between one and the other. The sole purpose of the continued detention was to illegally broaden the scope of the original detention. Robinette's consent clearly was the result of his illegal detention, and was not the result of an act of will on his part. Given the

circumstances, Robinette felt that he had no choice but to comply.

This case demonstrates the need for this court to draw a bright line between the conclusion of a valid seizure and the beginning of a consensual exchange. A person has been seized for the purposes of the Fourth Amendment when a law enforcement officer, by means of physical force or show of authority, has in some way restrained his liberty such that a reasonable person would not feel free to walk away. *United States v. Mendenhall* (1980), 446 U.S. 544, 553-554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509.

The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.

The present case offers an example of the blurring between a legal detention and an attempt at consensual interaction. Even assuming that Newsome's detention of Robinette was legal through the time when Newsome handed back Robinette's driver's license, Newsome then said, "One question *before you get gone:* are you carrying any illegal contraband in your car?" (Emphasis added.) Newsome tells Robinette that before he leaves Newsome wants to know whether Robinette is carrying any contraband. Newsome does not ask if he may ask a question, he simply asks it, implying that Robinette must respond before he may leave. The interrogation then continues.

Robinette is never told that he is free to go or that he may answer the question at his option.

Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

We are aware that consensual encounters between police and citizens are an important, and constitutional, investigative tool. *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389. However, citizens who have not been detained immediately prior to being encountered and questioned by police are more apt to realize that they need not respond to a police officer's questions. A "consensual encounter" immediately following a detention is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all.

Therfore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

While the legality of consensual encounters between police and citizens should be preserved, we do not believe that this legality should be used by police officers to turn a routine traffic stop into a fishing expedition for unrelated criminal activity. The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution exist to protect citizens against such an unreasonable interference with their liberty.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., WRIGHT and RESNICK, JJ., concur.

DOUGLAS F.E. SWEENEY, SR., J., dissenting. I am disturbed by the majority's requirement that police officers must now recite certain words before a consensual interrogation may begin. This "bright-line" test appears unique to Ohio and vastly undercuts our law enforcement's ability to ferret out crime. Furthermore, the majority's test is contrary to well-established state and federal constitutional law.

The United States Supreme Court has made it clear that not every encounter between a police officer and citizen is a seizure. *Florida v. Bostick* (1991), 501 U.S. 429, 434, 111 S.Ct. 2382, 2886, 115 L.Ed.2d 389, 398. Instead, the encounter becomes a seizure and is subject to Fourth Amendment scrutiny only when the encounter loses its consensual nature.[1] *Id.* Traditionally, the crucial test has

[1] Section 14, Article I of the Ohio Constitution is analogous to the Fourth Amendment to the United States Constitution.

always been "whether, taking into account all of the circumstances surrounding the encounter, the police conduct 'would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Id.* at 437, 111 S.Ct. at 2387, 115 L.Ed.2d at 400. In other words, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509. See, also, *State v. Childress* (1983), 4 Ohio St.3d 217, 4 OBR 534, 448 N.E.2d 155. The determination of whether consent has been freely given has always been a factual one, which, once made, should not be disturbed on appeal. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-2048, 36 L.Ed.2d 854, 862-863.

The United States Supreme Court has consistently applied this legal standard in cases dealing with consensual encounters. In fact, in *Bostick, supra,* the Supreme Court struck down a *per se* rule adopted by the Florida Supreme Court that all routine bus searches were unconstitutional. The Supreme Court remanded the case to the state court to apply the totality-of-the-circumstances test. More to the point of the facts of this case, in *Florida v. Jimeno* (1991), 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297, the court applied this legal standard to justify a consent to search following a traffic stop.

Indeed, courts from around the nation have had no problem in upholding the validity of consensual searches where consent was obtained after a traffic stop. See, *e.g., State v. C.S.* (Fla.App.1994), 632 So.2d 675; *State v. Bonham*

(1993), 120 Or.App. 371, 852 P.2d 905; *United States v. Werking* (C.A.10, 1990), 915 F.2d 1404.

Despite this well-established test, the majority now holds that before a police officer may engage in consensual interrogation, the officer must inform the individual that "at this time you legally are free to go." However, the United States Supreme Court has ruled that being informed of the right to refuse a search is but one factor to be taken into account when determining whether consent was freely given; it is not the "*sine qua non* of an effective consent." *Schneckloth, supra,* 412 U.S. at 227, 93 S.Ct. at 2048, 36 L.Ed.2d at 863. The distinction between being informed of the right to refuse a search and being informed of the right to leave the scene is insignificant. Whether the police officer uttered a warning is a relevant consideration, but it does not end the inquiry.

I would instead apply the totality-of-the-circumstances test to this case. Here, appellee was properly stopped and detained for speeding. After the traffic matter was concluded, the officer returned appellee's license. Appellee testified that he believed he was free to leave. At this point, the encounter between appellee and the police officer became an ordinary consensual encounter between a private citizen and a law enforcement officer. Since appellee's liberties were not curtailed and since he understood that he could leave, there was no "seizure" implicating state or federal constitutional guarantees. Appellee's consent should not be invalidated solely because it followed a traffic stop and simply because the police officer failed to warn appellee that he was free to do. The utterance of these "magic words" is but one factor for the fact-finder to consider when making the

determination as to whether consent was voluntarily given.

In *Mendenhall, supra,* at 554, 100 S.Ct. at 1877, 64 L.Ed.2d at 509, the United States Supreme Court lists other examples of circumstances that might indicate a seizure and, consequently, invalid consent: the threatening presence of several officers, display of a weapon, physical touching of the person, and the use of language or tone of voice indicating that compliance with the officer's request is compelled. None of these factors was present in this case. Appellee testified that the officer was nice to him at all times and never drew a weapon. Although appellee may have been intimidated or nervous, the officer's conduct did not rise to such a level as to make him believe he had to agree to the search.

As support for its holding, the majority relies on *State v. Chatton* (1984), 11 Ohio St.3d 59, 11 OBR 250, 463 N.E.2d 1237. However, *Chatton* is clearly distinguishable from the case. In *Chatton,* the police officer stopped the defendant for driving without license plates. Once the officer discovered that the vehicle displayed a temporary tag, which made his initial stop improper, the officer nevertheless detained the defendant and asked to see his license. The issue in *Chatton* was whether the police officer had continuing justification to detain the defendant. In this case, the issue is whether an individual who has been validly detained pursuant to a traffic stop may, in response to a police request, give a free and voluntary consent to search, once the traffic stop has been completed and the individual knows he is free to leave. Even the majority concedes that consent was not an issue in *Chatton.* However, the instant case turns entirely on the

use of consent. Thus, *Chatton* has little applicability to this case.

This technique of requesting consent following an initial valid detention is employed on a daily basis throughout this nation to interdict the flow of drugs. While I certainly do not advocate giving police officers carte blanche in their treatment of traffic violators, when the original stop is permissible, the police should be permitted to make inquires that are not coercive. The majority's bright-line test undercuts police authority and severely curtails an important law enforcement tool that is sanctioned by state and federal constitutional law.

For all those reasons, I would reverse the court of appeals and reinstate the trial court's judgment.

DOUGLAS and COOK, JJ., concur in the foregoing dissenting opinion.

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	Case No. 14074
	:	(T.C. Case No.
v.	:	92-CR-1800)
ROBERT D. ROBINETTE	:	
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 15th day of April, 1994

CARLEY J. INGRAM, S. Ct. Regis. No. 20084, Assistant Prosecuting Attorney, 41 N. Perry Street, Dayton, OH 45402

Attorney for Plaintiff-Appellee

JAMES D. RUPPERT, S. Ct. Regis. No. 11817, P O Box 369, Franklin, OH 45005

Attorney for Defendant-Appellant

FAIN, J.

Defendant-appellant Robert D. Robinette appeals from his conviction and sentence for Drug Abuse. Robinette contends that the trial court erred by denying his motion to suppress. He contends that once the purpose for the investigative stop – in this case the issuance of a warning for speeding – had been satisfied, the officer could not lawfully detain him further for the purpose of

securing his consent to search for narcotics. We agree, based upon *State v. Retherford* (March 16, 1994), Montgomery App. No. 13987, unreported, which we approve and follow. Accordingly, the judgment of the trial court is *Reversed*, and this cause is *Remanded* for proceedings consistent with this opinion.

I

Robinette was traveling at 69 miles per hour on I-75 at a point where, because of construction, the speed limit had temporarily been posted at 45 miles per hour. Montgomery County Sheriff's Deputy Roger Newsome was stopping speeders at this location. He was merely giving them warnings, in an effort to keep the speed down to a safe level. He stopped Robinette for the purpose of giving a warning. Newsome admitted that he never had any suspicions concerning Robinette beyond giving him a warning for speeding. That was the sole purpose for the stop.

Before Newsome gave Robinette a warning, he went back to his cruiser and activated a video camera. He had Robinette stand in front of the cruiser. Immediately after giving Robinette a warning, with no pause or break in the conversation, Newsome asked Robinette if he was carrying any kind of contraband, including drugs, and Robinette said that he was not. Then Newsome asked for and received permission to search Robinette's car. The search disclosed some packets of marijuana in a total amount that is described as small, as well as a pill that was determined to be MDMA, or Ecstasy. Robinette was arrested and charged with Drug Abuse. Robinette moved

to suppress the evidence, contending that it was obtained as a result of an illegal search. The trial court denied the motion to suppress, holding that Robinette's consent to search was free and voluntary.

Following a denial of his motion to suppress, Robinette pled no contest, was found guilty, and was sentenced accordingly. From his conviction and sentence, Robinette appeals.

II

Robinette's sole Assignment of Error is as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO GRANT HIS MOTION TO SUPPRESS EVIDENCE OBTAINED SUBSEQUENT TO AN ILLEGAL DETENTION AND SEARCH OF APPELLANT AND HIS VEHICLE.

Robinette contends that after he was given a warning for speeding, the acknowledged purpose for the stop was satisfied. Robinette argues that, pursuant to *State v. Chatton* (1984), 11 Ohio St. 3d 59, and *Fairborn v. Orrick* (1988), 49 Ohio App. 3d 94, once the purpose for the stop had been satisfied and there was no subsequent reason to suspect Robinette, the investigative stop was over and there should have been no further detention for purposes of investigation. The State contends that Robinette was free to go, so that there was no detention.

We conclude that a reasonable person in Robinette's position would not believe that the investigative stop had been concluded, and that he or she was free to go, so long

as the police officer was continuing to ask investigative questions.

An identical fact pattern involving the same officer was presented in *State v. Retherford* (March 16, 1994) Montgomery App. No. 13987, unreported. In that case, we held that once a police officer has issued a traffic citation or warning for a speeding violation, it is unreasonable to detain the motorist further for the purpose of obtaining consent to search for drugs or alcohol, absent a reasonable and articulable suspicion that the motorist is transporting either drugs or alcohol.

We approve and follow our holding in *State v. Retherford, supra*. Because the search in the case before us resulted from an unlawful detention, it is the fruit of an unlawful seizure, and the fact that Robinette, during the unlawful detention, may have consented to the search is immaterial.

Robinette's sole Assignment of Error is sustained.

III

Robinette's sole Assignment of Error having been sustained, the judgment of the trial court is *Reversed*, and this cause is *Remanded* to the trial court for further proceedings consistent with this opinion.

YOUNG, J., concurs.
WOLFF, J., dissenting:

In *State v. Pinder* (Dec. 15, 1993), Miami App. No. 93 CA 6, unreported, this court held that "a valid consent to

search cannot be given following an illegal detention to which it is strongly connected, and . . . evidence uncovered as a result of such a search must be suppressed as fruit of the poisonous tree." P. 10. In *Pinder*, the consent to search was obtained *during* the course of what the trial court implicitly found was an unlawful detention. P. 7. Hence, this court did not consider whether the consent was voluntary in fact (which the trial court had found it was not).

In *State v. Retherford* (Mar. 16, 1994), Montgomery App. No. 13987, unreported, this court considered a situation quite similar to the situation in this case. In *Retherford*, the trial court had found that after a lawful traffic stop, Deputy Newsome had told Retherford that she was free to leave, and that she was thus not in custody when Deputy Newsome then asked for permission to search her car. The trial court also found that thereafter Retherford had consented to the search of her vehicle. This court determined that the trial court erred in its determination that Retherford "was not seized (i.e., being detained) at the time Deputy Newsome asked for her consent to search her vehicle" because "a reasonable person in Retherford's place would (not) have felt 'free to leave' under the circumstances herein." Pp. 14-15. In other words, this court determined that Retherford's consent was obtained "during the course of an illegal detention", and, following *Pinder*, declined to address whether the consent to search was voluntary in fact but, rather, held that the fruits of the search should be suppressed as that of the poisonous tree. P. 24. Essentially, the court reasoned that when Deputy Newsome sought Retherford's

consent to search her car, she was still detained, notwithstanding the trial court's finding to the contrary, and that the detention was illegal because the traffic stop was concluded and there was no reasonable and articulable basis for continued detention of Retherford.

In this case, the majority chooses to follow *Retherford*, hold that Robinette's consent was obtained "during the unlawful detention", reverse on that basis, and not consider that his consent may have been voluntary in fact because that issue is immaterial given that the consent was obtained during an illegal detention.

In my judgment, the premise upon which the holdings in *Retherford* and in this case are based is flawed. That premise is that, as a matter of law, a reasonable person in these defendants' positions would not believe that the investigative stop had been concluded, and that he or she was free to go.

In addition to my own reservations about this premise, a recent article in the Dayton Daily News tends to belie the premise. Derek Ali, a black staff writer, wrote about three incidents in which he had been a victim of racial stereotyping. The first incident concerned a situation similar to the one presented here.

> Until the last quarter of 1993, I shrugged at suggestions from young black men and women who complained about receiving poor treatment based on how they're dressed.
>
> Normally, I wear suits six days a week and generally the people I come in contact with treat me in a respectful manner. Things changed on three separate occasions when I switched to a ball cap, sweats and sneakers.

* * *

> In October, a Franklin County sheriff's deputy stopped me along a stretch of Interstate 70, just outside of Columbus. She approached the car, asked me routine questions and took my driver's license.
>
> I thought nothing of the backup cruiser that pulled up until she returned to my car in what seemed like 20 minutes to inform me I would just get a warning. Before I could thank God for the blessing, the deputy asked permission to search my car for contraband.
>
> I wanted to say, yes, go ahead, check my car. Let the record reflect that an African-American can drive a major interstate without a trunkload of illegal drugs. *However, I declined the search and went on my way.*
>
> I thought little of the incident until later when a Dayton police officer told me I probably fit the sheriff department's profile of a drug runner – a young black male between 18 and 35 driving a late model vehicle from one major city to another.
>
> That's when I became almost as angry as younger blacks who say they're treated like criminals because of their age, dress or some other subjective information used to perpetuate stereotypes, prejudice and discrimination. "Discrimination wears thin – like an old sweatshirt", *Dayton Daily News*, March 6, 1994. (Emphasis mine.)

The relevance of this story to this appeal is simply that Mr. Ali, an obviously well educated individual who does

not appear to be a lawyer, believed that he was free to refuse the police officer's request to search his car.

The evidence in this case established that in the mind of Deputy Newsome, Robinette was "free to go" when he gave him a warning and returned his driver's license to him. Although Deputy Newsome did not tell Robinette he was free to go, Robinette, who has a bachelor of science degree in botany, answered "yes" to the prosecutor's question: "I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?"

In my judgment, the evidence supports a determination that Robinette was not being detained at the time he consented to the search of his car, and the trial court appears to have so found. As such, whether his consent was voluntary in fact is a material issue. The evidence amply supports the trial court's finding that Robinette's consent was voluntary in fact.

Constitutional mischief only occurs when the consent to search, voluntary or not, is obtained during the course of an illegal detention. If the detention has ceased, and a subsequent consent to search is voluntary in fact, the fruits, if any, of the search are not those of the poisonous tree. I am not persuaded that trial judges cannot determine on a case-by-case basis whether and, if so, when detention has come to an end vis-a-vis a request to search.

Because the evidence supports a determination that the consent was voluntary in fact, and was not obtained during the course of an illegal detention, I would affirm.

Copies mailed to:

CARLEY J. INGRAM
JAMES D. RUPPERT
HON. JOHN W. KESSLER

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

CRIMINAL DIVISION

THE STATE OF OHIO,	:	CASE NO. 92-CR-2800
Plaintiff,	:	(Judge John W. Kessler)
-vs-	:	DECISION AND ORDER
ROBERT D. ROBINETTE,	:	
Defendant.	:	

This case is before the Court on Defendant's Motion to Suppress evidence and statements.

The testimony of the witnesses at the suppression hearing establish that on August 3, 1992, Defendant was stopped by Montgomery County Sheriff's Deputy Newsom on I-70 at Diamond Mill Road for driving 69 MPH in a 45 MPH limit construction zone. Deputy Newsom was part of a unit directed to interdict potential contraband carriers on the highways in and around Dayton. Absent probable cause to search or an admission of criminal conduct, the unit's suggested procedure was for the investigating officer to attempt to gain the detained suspect's consent to search.

In this case, Deputy Newsom, upon his traffic stop, decided to merely issue a verbal warning to Defendant concerning his speeding violation, but also to continue investigating Defendant by asking if Defendant had any contraband or guns in his car. Upon a negative response from Defendant, Newsom requested permission to search

the car, which was granted by Defendant, and a subsequent seizure of contraband occurred.

The question presented to this Court for determination is the validity of the consent given by Defendant. "The question whether the [Defendant's] consent – was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances – and is a matter which the government has the burden of proving." *U.S. v. Mendenhall*, 466 U.S. 544 (1980).

The Court in the instant case is greatly aided by a video tape of the encounter between Deputy Newsom and Defendant. Ordinarily this Court would find the "custodial status" of the Defendant in the midst of a traffic arrest to be of great significance to the issue. Here, however, prior to the inquiry about contraband possession or consent, the officer made it clear to Defendant that the traffic matter was concluded.

Defendant claims he was unaware that he could refuse the officer's request to search. "Although the Constitution does not require proof of knowledge of a right to refuse as the sine-qua-non of an effective consent to search . . . such knowledge was highly relevant to the determination that there had been consent." *Mendenhall, supra*. In the instant case, again, however, the video tape belies this claim. The manner of inquiry, the phrasing of the request and the position of the parties eliminates the suggestion of overbearance by the officer.

The above-stated circumstances coupled with the Defendant's education and intelligence cause this court to

find that Defendant's consent was valid and not the product of duress or coercion.

Defendant's Motion to Suppress is not well taken and is OVERRULED.

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

SO ORDERED:

JOHN W. KESSLER, JUDGE

JANET R. SORRELL, Assistant Prosecuting Attorney, Attorney for Plaintiff, Fifth Floor, 301 W. Third Street, Datyon, Ohio 45402 (513) 225-5757

JAMES D. RUPPERT, Attorney for Defendant, 1063 E. Second Street, P.O. Box 369, Franklin, Ohio 45005 (513) 746-2832

ASSIGNMENT OFFICE
TIM WALKER, Bailiff

**IN THE COURT OF COMMON PLEAS,
MONTGOMERY COUNTY, OHIO**

STATE OF OHIO,	)	
PLAINTIFF,	)	**CASE NO. 92-CR-280**
vs:	)	
ROBERT D. ROBINETTE,	)	**MOTION TO SUPPRESS**
DEFENDANT.	)	

Now comes the Defendant, Robert D. Robinette, by and through counsel, and respectfully moves this Court for an Order suppressing the use of the following as evidence:

1) A quantity of metlyenedioxy-meth-amphetamine (MDMA)

2) Any and all statements allegedly obtained from the Defendant regarding the above captioned case.

The basis for this motion is more fully articulated in the attached memorandum.

An oral hearing to develop a factual basis for and to present additional legal arguments in support of this Motion is hereby requested.

RUPPERT, BRONSON,
CHICARELLI & SMITH

/s/ James D. Ruppert
James D. Ruppert 0011817
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MEMORANDUM

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures. When a search is reasonable or unreasonable is a question to be decided by a judicial officer, not by a police officer. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Searches conducted outside the judicial process are "*per se* unreasonable", subjected only to specifically established and well defined exceptions which may not be expanded at an officer's whim. *Keith v. United States*, 357 U.S. 493 (1960).

In the case at bar, the officer went well beyond any recognized exception. The Defendant had been stopped due to an alleged speeding violation. Upon stopping the Defendant, the officer obtained Defendant's license. He then returned and asked the Defendant to step from the vehicle. The officer then returned to his cruiser and started the video and audio tape. At this point he returned to the Defendant who was waiting out of his vehicle, between the cars. The officer then informed Defendant that he was only going to give him a verbal warning and not issue a citation and stated that he was free to go.

It is at this point the officer violated the Defendant's rights. Attempting to make it look like an afterthought, the officer continued to detain the Defendant and question him about illegal drugs in the vehicle. The officer, at this point, was on a fishing expedition. He has no articulable reason for further detention of the Defendant.

In *State v. Chatton*, 11 Ohio St. 3d 59 (1984) the Ohio Supreme court clearly and unambiguously held that once an officer's reason for making a traffic stop has been

completed, he cannot then further detain the person. It is firmly established that the detention of an individual by a law enforcement officer must, at the very least, be justified by 'specific and articulable facts' indicating that the detention was reasonable. *Chatton*, 11 Ohio St. 3d at 61.

In the case at bar, the initial detention was reasonable as there was an alleged speeding violation. The rule in *Chatton*, however, precludes police officers from then engaging in unbridled activity. "[A]bandonmnt of effective judicial supervision of this kind of seizure . . . leaves police discretion utterly without limits." *Id.* at 62. Thus, the rule in *Chatton* not only requires an articulable reason for the initial stop but an articulable reason for any detention beyond that required for the initial stop. "Once a police officer has made a legitimate and constitutional stop of a vehicle, the driver and the vehicle may be detained *only* for as long as the officer continues to have a reasonable suspicion that there has been a violation of law." *State v. Myers*, 63 Ohio App. 3d 765, 771 (1990) (citing *Chatton*).

This rule has been meticulously applied. The Second Appellate District has stated that "the mere fact that a police officer has an articulable and reasonable suspicion sufficient to stop a motor vehicle does not give that police officer 'open season' to investigate matters not reasonably within the scope of his suspicion." *Fairborn v. Orrick*, 49 Ohio App. 3d 94, 95 (1988).

All of the cited cases are in accord. Once a police officer detains someone, the detention can only continue so long as there continues to be an articulable and reasonable suspicion. "If, after inspecting the vehicle or talking

to the driver, the police officer is satisfied that there has been no unlawful activity, the driver *must* be permitted to continue on his or her way." *Myers* 63 Ohio App. 3d at 771.

When one applies this rule to the case at bar, it is clear that the officer continued into an unlawful detention and search. He stopped the vehicle for a speeding violation. He satisfied himself concerning the violation and returned the license giving a verbal warning. He had no other "reasonable or articulable" suspicion" [sic] for continuing the detention. He had no right to further detain the Defendant so he could randomly question him concerning drugs. The officer, at this point, started a fishing expedition, which was based, at best, on a hunch. As such, anything obtained as a result must be suppressed pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1973).

The State will undoubtedly argue that the search was lawful as the Defendant allegedly consented to the search. This, however, misses the point and ignores the law. The issue of consent is not even an issue in this case. This is due to the simple fact that the officer had already violated the Defendant's rights. His continued detention and questioning of the Defendant violates the Fourth Amendment. The only reason the officer even asked to search the car was because he had unlawfully detained the Defendant in violation of *Chatton*. *See also, Myers*, 63 Ohio App. 3d at 771; *Orrick*, 49 Ohio App. 3d at 95.

Moreover, because the continued detention of the Defendant was unlawful, any statements made as a result of the continued questioning was obtained in violation of

the Defendant's rights. *Chatton*, 11 Ohio St. 3d at 59; *see also, Wong Sun*, 371 U.S. at 471.

Wherefore, the Defendant requests this Court for an Order suppressing any and all tangible evidence obtained in the instant case, as well as any oral or written statements made at the time of the Defendant's arrest.

/s/ James D. Ruppert
James D. Ruppert 0011817
Attorney for Defendant

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that a true and accurate copy of the foregoing was mailed, postage prepaid, by ordinary U.S. Mail, to Janet Sorrell, Montgomery County Prosecutor's Office, 301 West Third Street, Dayton, OH 45402, this 18th day of February, 1993.

/s/ James D. Ruppert
James D. Ruppert 0011817
Attorney for Defendant

(3)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE DETENTION OF A MOTORIST AFTER THE COMPLETION OF A VALID TRAFFIC STOP FOR SPEEDING, SOLELY FOR THE PURPOSES OF VIDEOTAPING THE QUESTIONING OF SAID MOTORIST ABOUT CONTRABAND, DRUGS, OR WEAPONS, WHICH CULMINATED IN THE CONSENT OF THE MOTORIST TO SEARCH HIS VEHICLE, VIOLATES THE CONSTITUTIONALLY GUARANTEED RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES, PURSUANT TO THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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STATEMENT OF THE CASE

This case arises from the illegal detention and search of the vehicle of Respondent, Robert D. Robinette. Mr. Robinette was returning from a weekend trip to Chicago on August 3, 1992. He was traveling on I-70 within Montgomery County, Ohio, at the time of the incident. Deputy Newsome of the Montgomery County Sheriff's Office was on drug interdiction patrol on I-70 on the date in question. Newsome clocked Mr. Robinette's vehicle traveling at 69 miles per hour in a construction zone where the speed had been reduced to 45 miles per hour.

Newsome pulled Mr. Robinette over solely for a speeding violation. Newsome admitted that no other violation had occurred and that he was only going to give Mr. Robinette a verbal warning for the speeding violation. He requested Mr. Robinette's license, returned to his vehicle, and ran a LEADS check on the license. Finding no violations, Newsome should have merely returned the license and issued his warning, thereby allowing Mr. Robinette to continue on his way.

However, because of his involvement with a drug interdiction task force, Newsome retained the license and asked Mr. Robinette to exit the vehicle and stand in front of his cruiser. Newsome then returned to his cruiser and activated a video camera. He then returned to Mr. Robinette and questioned him as to the presence of drugs, contraband, and weapons in his vehicle. Subsequently, Newsome obtained Mr. Robinette's consent to search the vehicle. The search revealed a small quantity of methamphetamine (MDMA or Ecstasy), one-half of a pill located in a film container in the vehicle. Mr. Robinette

was subsequently arrested and charged with a violation of Ohio Revised Code section 2925.11(A), a felony of the fourth degree.

The timing of the scenario was critical in the decision of the court below. Newsome's request immediately followed the warning about speeding:

> Officer Newsome: Okay. Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?
>
> Mr. Robinette: I didn't see the sign was dropped down.
>
> Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.
>
> ***One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?***

See Appendix (*State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Transcript of Videotape, Joint Exhibit A, pages 3-4).

An indictment was later returned against Mr. Robinette. A Motion to Suppress was filed on the basis that Newsome's actions violated the Fourth Amendment. After an evidentiary hearing at which a videotape of the incident was admitted, the trial court overruled the motion to suppress. Robinette pleaded no contest and

was found guilty by the trial court. Robinette subsequently appealed to the Ohio Second District Court of Appeals, which reversed the trial court, ruling that the search of the vehicle resulted from an unlawful detention of Robinette without any articulable reason.

The State of Ohio appealed the Second District's ruling to the Ohio Supreme Court. In a 4-3 decision, rendered on September 6, 1995, the Ohio Supreme Court affirmed the Court of Appeals. The Court further created a bright-line test to be applied when motorists are validly detained for traffic offenses. This test requires that the detaining officer clearly inform the motorist that he or she is legally free to go prior to engaging in any subsequent "consensual" interrogation.

ARGUMENT

This case does not primarily involve the consensual encounter doctrine, as urged by the State of Ohio and Amici States. Rather, it is a case in which law enforcement exceeded the permissible bounds of an investigative detention, thereby contravening this Court's prior pronouncements on the permissible scope of investigative detentions.

I. THE CONTINUED DETENTION OF MR. ROBINETTE WAS NOT REASONABLY RELATED IN SCOPE TO THE JUSTIFICATION FOR THE ORIGINAL TRAFFIC STOP.

The facts reveal that Deputy Newsome stopped Mr. Robinette for speeding. It is beyond dispute that this stop is an investigatory stop, previously held by this Court to constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). A traffic stop is more analogous to an investigative detention or "Terry stop" than a custodial arrest. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

The law with regard to investigatory stops was established by this Court in the seminal case of *Terry v. Ohio*, 392 U.S. 1 (1968). The premise underlying *Terry* is that "in order to justify the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. This standard of reasonableness is imposed "upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions. . . . '" *Prouse*, 440 U.S. at 654 (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

Terry requires a dual analysis to determine: (1) whether the officer's action was justified at the inception of the stop, and (2) whether the officer's action at issue was reasonably related in scope to the circumstances

which justified the interference in the first place. *Id.* at 20; *see also Pennsylvania v. Mimms*, 434 U.S. 106, 113-14 (1977) (Marshall, J., dissenting). Evidence "may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Terry*, 392 U.S. at 29.

It is conceded that the initial stop of Mr. Robinette was proper and comports with the first prong of the analysis in *Terry, supra*. Clearly, Mr. Robinette was speeding. He was "clocked" by Deputy Newsome traveling in excess of the posted speed limit and was validly detained for that reason. It is on the second prong of the *Terry* analysis, however, that the Deputy's conduct exceeded the justification for the original stop. From the inception of the stop, the officer testified that he was only going to issue a warning to Mr. Robinette. Therefore, when the Deputy returned to Mr. Robinette's vehicle after checking his license, he had fully investigated the violation and resolved the matter. All the Deputy needed to do was return Mr. Robinette's license and issue a warning. However, as noted by the Ohio Supreme Court:

> Instead, for no reason related to the speeding violation, and based on no articulable facts, Newsome extended his detention of Robinette by ordering him out of the vehicle. Newsome retained Robinette's driver's license and told Robinette to stand in front of the cruiser. Newsome then returned to the cruiser and activated the video camera in order to record his questioning of Robinette regarding whether he was carrying any contraband in the vehicle.
>
> . . . .

> The entire chain of events, starting when Newsome had Robinette exit the car and stand within the field of the video camera, was related to the questioning of Robinette about carrying contraband. Newsome asked Robinette to step out of his car for the sole purpose of conducting a line of questioning that was not related to the initial speeding stop and that was not based on any specific or articulable facts that would provide probable cause for the extension of the seizure of Robinette, his passenger and his car. ***Therefore the detention of Robinette ceased being legal when Newsome asked him to leave his vehicle.***

See State v. Robinette, 73 Ohio St. 3d 650, 653 (1995) (emphasis added). In other words, the mere fact that Deputy Newsome initially had an articulable and reasonable suspicion that Mr. Robinette was speeding did not entitle him "to turn a routine traffic stop into a fishing expedition for unrelated criminal activity." *Id.* at 655. Nor does the fact that the deputy returned Mr. Robinette's license to him immediately prior to questioning him magically transform the initially valid traffic stop into a consensual encounter.

Deputy Newsome, in fact, had admitted to requesting consent to search vehicles "as a matter of course" in approximately 786 traffic stops in 1992 ***alone***. *State v. Retherford*, 93 Ohio App. 3d 586, 597 n.3 (1994). Mr. Robinette is but one of those stops. It does not take a mathematical genius to determine that this figure multiplied by the numerous law enforcement agencies and officers who utilize this same tactic yields a staggering number of citizens being "asked to relinquish their privacy rights in

the name of 'voluntary cooperation' with the government. . . . " *Id.*

The Ohio Supreme Court and Second Appellate District recognized the tactic of the Montgomery County Sheriff's Office (and the hundreds of other law enforcement agencies in Ohio and, perhaps, across the nation) for what it was. In the words of the Second Ohio Appellate District, the tactic is:

> merely a pre-arranged ploy to attempt to end the 'seizure' so that the Deputy could interrogate [Robinette] and obtain [his] consent to search based on nothing more than the slightest 'inchoate' and 'unparticularized' hunch that [he] might be transporting contraband.

Id. at 599. According to established Fourth Amendment jurisprudence, the Ohio Supreme Court was correct in holding that this pre-arranged ploy, resulting in the continued detention of Mr. Robinette, constituted an illegal seizure. *Robinette*, 73 Ohio St. 3d at 653.

Without missing a beat, however, Deputy Newsome continued to interrogate Mr. Robinette on videotape. Quite reasonably, Mr. Robinette, who moments earlier may have felt free to leave, felt constrained to answer the Deputy's questions. These answers culminated in his consent, obtained during the illegal detention, to search his vehicle. Because the consent was obtained pursuant to an illegal detention, Robinette's consent was invalid unless the State proved that it was the result of an independent act of free will on Robinette's part. *See Robinette*, 73 Ohio St. 3d at 654 (citing *Florida v. Royer*, 460 U.S. 491, 501 (1983)).

The similarities between this case and *Royer* are striking. In *Royer*, the detainee's airline ticket and license were retained by DEA agents while Royer was asked to accompany the officer's to an investigation room. *Royer*, 460 U.S. at 494. Mr. Robinette's license and registration were retained by Deputy Newsome, when he asked Mr. Robinette to exit his vehicle and stand in front of the police cruiser for the purpose of being videotaped. Royer's consent to search was obtained as a result of subsequent questioning during what this Court found to be an illegal detention exceeding the bounds of that approved in *Terry*. Likewise, Mr. Robinette's consent was obtained during an illegal detention exceeding the scope of the justification for the stop for speeding.

Royer clearly supports the holding of the Ohio Supreme Court that Mr. Robinette was being illegally detained at the point where he consented to the search of his vehicle. Thus, as in *Royer*, Mr. Robinette's "consent was tainted by the illegality and was ineffective to justify the search." *Royer*, 460 U.S. at 507-08.

II. THE REQUIREMENT OF ADVICE FROM A LAW ENFORCEMENT OFFICER TO A DETAINED MOTORIST AT THE CONCLUSION OF A TRAFFIC STOP THAT THE MOTORIST IS LEGALLY FREE TO GO IS NOT PROHIBITED UNDER THE FOURTH AMENDMENT.

In the courts below, Petitioner has consistently argued that the act of returning Mr. Robinette's license constituted the "bright line" between a valid detention and the claimed subsequent consensual encounter which resulted in consent to search Mr. Robinette's vehicle.

Now that the Ohio Supreme Court has seen fit to delineate a "bright line," by imposing a warning requirement upon law enforcement personnel in the limited context of motor vehicle stops, the State urges this Court to accept this case in order to rule that the Ohio Supreme Court has interpreted the constitutional guarantees of the Fourth Amendment too broadly so as to overprotect the citizens of Ohio. *See Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting).

Petitioner urges that one single factor cannot determine whether or not police contact is consensual or compelled. Amici States argue that no "prophylactic warning" must be given in order for police to engage in a consensual encounter. Amici States concede, however, that advice from a law enforcement officer as to a person's legal status may well be an appropriate component in the equation when considering whether consent is voluntary. Prior holdings of this Court are consistent with and bear out this principle.

For example, in *United States v. Mendenhall*, 446 U.S. 544, 558-59 (1980), this Court opined that:

> [I]t is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it. Although the Constitution does not require 'proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search' [Schneckloth v. Bustamonte, supra], at 234 (footnote omitted), such knowledge was highly relevant to the determination that there had been consent. And, perhaps more important for present purposes, the fact that the officers themselves informed

> the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive.

Likewise, in *Florida v. Bostick*, 501 U.S. 429 (1991) and *Florida v. Jimeno*, 500 U.S. 248 (1991), the detainees were advised of their right to refuse consent to search.

Petitioner relies upon the case of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), for the proposition that the government need not prove, as the *sine qua non* of effective consent that the subject of the search had a right to refuse. The case herein, however, does not fit squarely within the holding of *Schneckloth*. *Schneckloth* holds that the government need not, as part of its burden of proof, prove that the person giving consent knew that he or she had a right to withhold that consent. *Id.* at 249. Nothing in *Schneckloth* prohibits the imposition of a requirement on law enforcement personnel to inform a motorist that he or she is legally free to go at the conclusion of a valid traffic stop.

Nor does the imposition of such a requirement create an impermissible "per se" rule contrary to prior holdings of this Court. Both Petitioner and Amici States rely on *Bostick, supra*, and *Michigan v. Chesternut*, 486 U.S. 567 (1988), for the proposition that this Court has consistently rejected the importation of bright-line standards into Fourth Amendment analysis. This Court did strike down overbroad holdings of other state courts in these cases. However, these were cases in which the respective state court holdings involved all-or-nothing propositions of law. For example, in *Bostick*, this Court struck down the holding of the Florida Supreme Court that all bus

searches were unconstitutional. In *Chesternut*, this Court struck down a Michigan Court of Appeals' holding that all investigatory pursuits were seizures.

The holding of the Ohio Supreme Court is not this type of all-or-nothing proposition. The court did not state (as argued by Petitioner and Amici States) that a court's determination of whether or not an encounter is consensual will turn ***solely*** upon whether or not such a warning has been given. Indeed, the court had previously approved and followed the totality of circumstances standard set forth in *Schneckloth*. *State v. Childress*, 4 Ohio St. 3d 217 (1983) (syllabus at 1). The requirement of a statement informing a motorist that he is legally free to go is merely one more circumstance to be considered in the equation of totality of the circumstances.

The Ohio Supreme Court recognized that the continued detention of Mr. Robinette was unlawful, and that he and other Ohio citizens similarly situated may not be subjected to further unrelated investigation unless they are first advised that they are legally free to leave. The court expressly recognized "the need . . . to draw a bright line between the conclusion of a valid seizure and the beginning of a consensual exchange." *Robinette*, 73 Ohio St. 3d at 654. To hold otherwise would allow the State to "bear the poison fruits" of the unlawful detention.

The required statement is not overbroad, as it has been limited to the context of motorists who have been previously detained for traffic violations. Nor does the required warning place those who are validly detained for traffic violations in a superior position to those who have not been previously detained. This is not a case of

mere police questioning. Deputy Newsome did not just approach Mr. Robinette on a street somewhere, ask him if he would be willing to answer some questions, and then put some questions to him because he was willing to listen. *See Florida v. Royer*, 460 U.S. at 497. Rather, Newsome, knowing that the purpose of the stop had been completed, removed Mr. Robinette from his vehicle and placed him in a position to videotape further interrogation unrelated to the purpose of the original stop. It is this conduct which constitutes the unlawful detention that the Ohio Supreme Court correctly condemns.

Deputy Newsome did not ask Mr. Robinette if he was willing to answer questions. He simply asked the questions, clearly implying that Mr. Robinette had to respond ***before*** he could leave. *Robinette*, 73 Ohio St. 3d at 654-55; Appendix (*State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Transcript of Videotape, Joint Exhibit A, pages 3-4). Mr. Robinette's answer was not consensual; it was nothing more than a submission to a claim of lawful authority. As such, the Ohio Supreme Court recognized that it was insufficient as a matter of law to sustain Petitioner's burden that his consent was an act of free will. *See Bumper v. North Carolina*, 391 U.S. 543 (1968).

Amici States contend, and not surprisingly, that such a test irreparably interferes "with legitimate law enforcement techniques." This argument ignores the importance of an individual's Fourth Amendment right to be free of unreasonable searches and seizures. Consent implies that the individual has waived his right to be free of such a seizure or search. Requiring an officer to inform the detained motorist that he is free to leave does nothing

more than level the playing field. Indeed, the State of Ohio has done nothing more than guarantee to its citizens constitutional protection from unreasonable interference with their rights when such interference has no cognizable constitutional basis.

Further, although the Ohio Supreme Court interprets federal law in reaching its decision, it also predicates its decision upon Section 14, Article I of the Ohio Constitution. This section guarantees "the right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures . . . . " As previously held by the same court:

> The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Arnold v. Cleveland, 67 Ohio St. 3d 35 (1993) (syllabus at 1). The "bright line" set forth in *Robinette* does nothing more than afford greater protection to Ohio motorists.

It is not unreasonable under the Fourth Amendment to require that a State's sworn officers protect a citizen's constitutionally guaranteed rights. What is unreasonable and untenable is to urge ignorance of one's constitutional rights as an effective law enforcement tool. An individual cannot secure himself against what would otherwise be

an unreasonable seizure or search if he is totally ignorant of his right to decline and walk away. As stated by Honorable Justice Mr. Brennan: "It wholly escapes me how our citizens can meaningfully be said to have waived something so precious as a constitutional guarantee without ever being aware of its existence." *Schneckloth v. Bustamonte*, 412 U.S. at 277 (Brennan, J., dissenting).

CONCLUSION

The Fourth Amendment guarantee to be free from unreasonable searches and seizures must not be taken lightly. This Court has previously recognized that it is "not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'war on drugs.' " *Bostick*, 501 U.S. at 439.

The decision of the Ohio Supreme Court is correct. Mr. Robinette was detained so that the deputy could illegally broaden the scope of the initially valid stop to "fish" for information under the guise of a drug interdiction program. The warning requirement imposed by the court does not create an unconstitutional *per se* rule. It merely ensures that constitutional guarantees are not being swept away at the unfettered discretion of law enforcement officers. Thus, the warning does not eviscerate the consensual encounter doctrine, but merely clarifies its legality.

For these reasons, the Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

-vs- Case No. 92-CR-2800

ROBERT D. ROBINETTE,

Defendant.

TRANSCRIPT OF VIDEOTAPE

of JOINT EXHIBIT A, a videotape, in the proceedings that came before the Honorable John B. Kessler, Judge, on the 26th day of February, 1993.

HOOVER REPORTING
Susan C. Hoover, RPR
Troy, Ohio
(513) 335-3008

COMPUTER-AIDED TRANSCRIPTION

[p. 3] Interstate 70
Dayton, Ohio

August 3, 1992
8:30:22 p.m.

Dispatch: (Inaudible.)

Officer Newsome: What do you do for a living?

Mr. Robinette: I work for International Paper.

Officer Newsome: Okay.

Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?

Mr. Robinette: I didn't see the sign was dropped down.

Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.

One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?

Nothing like that? Okay.

[p. 4] Is all the luggage in there both yours and his? All of it? Okay.

Would you mind if I search your car? Make sure there's nothing in there?

Wouldn't have any problem with it?

Why don't you step up here on the passenger side, right up here. Come on over here. Come out, please. Okay.

If you would both of you stand about ten feet in front of your car there and face the other way.

Dispatch: (Inaudible.)

Officer Newsome: Little bit further, if you would.

Dispatch: (Inaudible.)

Officer Newsome: Move up a little bit further, if you would.

That's fine. Right there. Thanks.

(Searching.)

Dispatch: (Inaudible.)

Dispatch: 308. (Inaudible.)

Dispatch: (Inaudible.)

Officer Newsome: Is that all the marijuana you got?

Mr. Robinette: Console.

Officer Newsome: Okay.

* * *

(4)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

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Respondent makes several assertions in his Brief in Opposition that require a response.

A. Respondent asserts that the Ohio Supreme Court did not abandon the totality of the circumstances test, but merely added the mandated admonition as an additional circumstance to be considered in determining whether consent to search or to answer questions was voluntary when such consent came at the conclusion of a lawful traffic stop. This is plainly wrong. The Ohio Supreme Court's holding in the case below is expressed in the syllabus, according to Ohio law. The second syllabus in this case provides as follows:

> The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

This is unambiguous declaration by the Court that, in Ohio, the failure to give such a warning renders any subsequent consent *ipso facto* involuntary.

The facts of this case also defeat Respondent's argument that the Court intended the mandatory admonition to be but one of many circumstances to be considered. Robinette testified that he knew he was free to leave when the officer gave back his driver's license. The videotape demonstrates that nothing about the encounter would have caused a reasonable person to believe that he

was not free to leave or was not free to refuse to answer the officer's questions. Yet the Ohio Supreme Court has decreed that Robinette's consent will be deemed in involuntary simply because he was not advised that he was free to go. Despite Respondent's attempts to minimize the import of the Court's decision, it is a *per se* rule, and an abdication of the totality of the circumstances test that this Court has endorsed many times over the past 20 years.

B. Respondent also attempts to portray the holding of the Ohio Supreme Court as primarily a matter of Ohio law decided under the Ohio Constitution, and argues that the decision does no more than afford Ohio motorists "greater protection." Nothing could be further from the truth. The Ohio Supreme Court unambiguously held that consent obtained form a motorist at the conclusion of a traffic stop, where the officer had not advised the motorist that he was free to go, violated the federal and state constitutions. This case was decided under the Fourth Amendment to the United States Constitution, and Respondent cannot in good faith claim that it does no more than give added protection to Ohio motorists under the Ohio Constitution.

Furthermore, the Ohio Supreme Court's decision that the practice violated both the federal and state constitutions is an insufficient basis upon which to deny certiorari. *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469. In *Ohio v. Wyant* (1993), 509 U.S. ___, 113 S.Ct. 2954, this Court granted a writ of certiorari, vacated judgement and remanded the case to the Ohio Supreme Court for further consideration in light of *Wisconsin v. Mitchell* (1993), 509 U.S. ___, 113 S.Ct. 2194. The basis of the Ohio Supreme Court holding in that case was that a particular

statute violated the federal *and* state constitutions. *State v. Wyant* (1994), 68 Ohio St.3d 162. As noted, this Court allowed the writ in that case where the holding was virtually identical to the language used by the Ohio Supreme Court in this case.

CONCLUSION

The Ohio Supreme Court has announced that admonition that the motorist is free to leave is the *sine qua non* of a voluntary consent when the consent comes at the conclusion of a traffic stop. This bright line test is contrary to a long, unbroken line of cases decided by this Court under the Fourth Amendment. For this reason, Petitioner respectfully requests that the Court grant certiorari in this case.

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No. 95-891

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF OHIO,
Petitioner,

v.

ROBERT D. ROBINETTE,
Respondent.

On Petition For Writ of Certiorari
To The Ohio Supreme Court

BRIEF FOR AMICI CURIAE STATES OF ARIZONA, FLORIDA, IDAHO, MINNESOTA, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, OKLAHOMA, RHODE ISLAND, TEXAS AND WYOMING IN SUPPORT OF PETITIONER STATE OF OHIO

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QUESTION PRESENTED - AMICUS FORMULATION

AFTER CONCLUDING A LEGITIMATE TRAFFIC STOP, ARE POLICE OFFICERS REQUIRED UNDER THE CONSTITUTION TO GIVE A PROPHYLACTIC, MIRANDA-LIKE WARNING (E.G., "AT THIS TIME YOU ARE LEGALLY FREE TO GO") BEFORE ASKING ANY ADDITIONAL QUESTIONS OF THE DRIVER OR BEFORE ASKING THE DRIVER'S CONSENT TO SEARCH THE VEHICLE?

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STATEMENT OF AMICUS INTEREST

In the decision below, the Ohio Supreme Court invented a new doctrine of federal constitutional law, one that will place additional obstacles in the path of legitimate law enforcement and one that flatly contradicts several precedents from this Court. The court held that after a legitimate traffic stop has ended, the police officer must warn the driver "At this time you are legally free to go" before asking the driver any additional questions or requesting the driver's consent to search the vehicle. *State v. Robinette*, 73 Ohio St.3d 650, 655 (1995). Accordingly, under the Ohio Supreme Court's decision, even though a driver voluntarily consents to a search (as happened here) and even though the police then find contraband in the car (as also happened here), the evidence nonetheless must be suppressed and the defendant allowed to go free.

Until now, that was not the law in this Court or any other. Time and again, this Court has made clear that there are no *per se* rules governing law enforcement efforts in this area of Fourth Amendment jurisprudence -- either at the federal level or with respect to the 50 States. The question whether a police encounter is consensual under the Fourth Amendment has always been one of context and reasonableness, focused on the facts and circumstances surrounding the event. Thus, as this Court has repeatedly held, "a person has been 'seized' within the meaning of the Fourth Amendment, *only if*, in view of all of the facts and circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (emphasis added). *See also Florida v. Bostick*, 501 U.S. 429 (1991); *California v. Hodari D.*, 499 U.S. 621 (1991); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Florida v. Rodriquez*, 469 U.S. 1 (1984); *INS v. Delgado*, 466 U.S. 210 (1984);

Florida v. Royer, 460 U.S. 491 (1983) (plurality opinion); *cf. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

In laying waste to this well-established doctrine, the Ohio Supreme Court has not just made new law but has also irreparably interfered with legitimate law enforcement techniques. Amici States thus are broadly concerned about the impact of the Ohio Supreme Court's decision on future law enforcement efforts. Consensual encounters between police and citizens arise in a wide variety of contexts -- not just traffic stops, but also at airports, on buses, in immigration factory sweeps, and on the streets. Today this decision limits a legitimate law enforcement technique in the seventh largest State in the country; but tomorrow it may well begin to limit this technique in other jurisdictions as well, particularly if a "*cert. denied*" notation is allowed to follow the case.

Just as importantly, consensual encounters most often arise in the context of drug interdiction efforts. For this reason, as Justice Powell correctly observed, courts should be particularly careful not to curb time-honored law enforcement efforts unnecessarily in this area:

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin may be easily concealed. As a result, the obstacles to detection of illegal conduct

may be unmatched in any other area of law enforcement.

United States v. Mendenhall, 446 U.S. 544, 561-62 (Powell J., joined by Burger C.J. and Blackmun J., concurring in part and concurring in the judgment). By imposing a requirement that police advise a person "At this time you are legally free to go," Amicus States believe that the Ohio Supreme Court has illegitimately impaired police reliance on consensual encounter as a tool of law enforcement and in the process has hampered one more law enforcement technique in the national effort to curb illegal drug trafficking and use. Accordingly, for this reason and those elaborated below, Amici States join together in asking this Court to review and reverse the Ohio Supreme Court's erroneous decision.

ADDITIONAL STATEMENT OF THE FACTS

It is difficult to overstate the importance of the trial court's findings of fact in this case. The court determined that respondent Robinette knew that the traffic stop had been concluded and that he was free to leave at the time he gave consent to search his car. This determination was supported most credibly by the testimony of Robinette himself. During cross-examination at the motion to suppress hearing, Robinette testified as follows:

Q. I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?

A. Yes.

Q. And you indicated that then he asked you whether or not you had contraband in that vehicle; is that correct?

A. Yes.

Q. And you -- and you obviously knew that you could answer that either yes or no; isn't that true?

A. Yes.

See Appendix *(State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Tr. page 27). No Ohio appellate court has reversed the trial court's well-supported (if not required) conclusion that Robinette voluntarily and freely consented to the search of his car. In spite of this unrebutted conclusion and the unrebutted testimony that supports it, the Ohio Supreme Court determined that no reasonable person would feel free to leave after a traffic stop had ended and that no reasonable person could voluntarily consent to a search in that context. In reaching this conclusion, the Ohio Supreme Court conspicuously fails to discuss or for that matter even acknowledge Robinette's testimony under oath that he did feel "free to leave" the scene at the time he gave consent to search his car.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO REVERSE THE DECISION OF THE OHIO SUPREME COURT, WHICH DISREGARDED CLEARLY-ESTABLISHED FOURTH AMENDMENT PRECEDENT OF THE UNITED STATES SUPREME COURT ON A FUNDAMENTAL ISSUE OF FEDERAL LAW.

A. Introduction.

The 4-3 decision of the Ohio Supreme Court in this case is premised on policy determinations about what type of law enforcement techniques are proper and about what type of law enforcement techniques are necessary. However prudent or wise these views may be, they are not consistent with this Court's precedents concerning consensual encounters and indeed hardly even pretend to be. The Ohio Supreme Court's holding flatly contradicts established law in at least three areas. First, the decision establishes a "bright line" test for assessing the Fourth Amendment validity of a consensual encounter, while this Court has repeatedly held that a "totality of the circumstances" test is required in this area. Second, the decision requires law enforcement officers to give a specific warning to insure the voluntariness of any consensual encounter, while this Court has specifically rejected the necessity of such a warning. Finally, the decision appears to hold that mere questioning of a citizen after a legitimate traffic stop constitutes an illegal seizure, while this Court has made clear that mere police questioning does not constitute a "seizure." The Court should grant certiorari to reaffirm its prior precedents in the face of a decision that wholly ignores them.

B. This Court Has Specifically Rejected *Per Se* Tests For Assessing The Validity Of A Consensual Encounter.

As an initial matter, there can be no debate that the Ohio Supreme Court used this case to establish a *per se* test with respect to Fourth Amendment consensual encounters. In plain terms, the decision says:

> We also use this case to establish a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation.

Robinette, 73 Ohio St.3d at 652. Whatever the merits of a *per se* test may be as a matter of policy, this Court has repeatedly rebuffed attempts to impose such a requirement. In *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988), for example, the Court rejected just such an attempt in the context of investigatory pursuits:

> Both petitioner and respondent, it seems to us, in their attempts to fashion a bright-line rule applicable to all investigatory pursuits, have failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account "'all of the circumstances surrounding the incident'" in each individual case. *INS v. Delgado*, 466 U.S. 210, 215 (1984), quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Opinion of Stewart J.). Rather than adopting either rule proposed by the parties and

> determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach and determine only that, in this particular case, the police conduct did not amount to a seizure.

Similarly, in *Florida v. Bostick*, 501 U.S. 429 (1991), the Court rejected a *per se* rule that all requests by police officers for consent to search the luggage of bus passengers are improper. In doing so, the Court reversed a lower court decision that, like this one here, attempted to establish a new *per se* rule in the area. The Court remanded the case back to state court for a ruling on the factual question that this Court has long used to distinguish "consensual encounters" from illegal "seizures" -- whether the person felt "free to leave" at the time of the encounter.

This fact-intensive test was first articulated by Justice Stewart fifteen years ago. "We conclude," he wrote,

> that a person has been "seized" within the meaning of the Fourth Amendment, only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

United States v. Mendenhall, 446 U.S. at 555. The standard has been followed without hesitation in a wide variety of settings. *See, e.g., Bostick* (bus passengers); *Chesternut* (investigatory pursuit); *INS v. Delgado*, 466 U.S. 210 (1984) (factory sweeps); *California v. Hodari D*, 499 U.S. 621 (1991) (police chase).

As this Court has recognized, this flexible approach has many merits. As an initial matter, it is textually based.

A facts-and-circumstances standard follows naturally from the relevant text of the Fourth Amendment, which refers only to "reasonable searches and seizures." What is more, the standard diminishes the risk that constitutional (*i.e.*, "reasonable") searches and seizures will be too quickly condemned as unconstitutional, in the end prohibiting the use of probative, necessary and legitimate evidence. This case is a perfect example. Even though respondent took the stand and admitted under oath that he felt "free to leave" when the officer asked for consent to search his car, the fruits of that search were suppressed. As Justice Stewart noted, "characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *Mendenhall*, 446 U.S. at 555. Quite simply, the lower court's *per se* test is at odds with this Court's precedents and imposes "wholly unrealistic restrictions" upon time-tested and legitimate methods of law enforcement.

C. This Court Has Specifically Rejected The Suggestion That A Prophylactic Warning Must Be Given In Order For Police To Engage In A Consensual Encounter.

In evaluating whether a reasonable person would "feel free to leave" at the time he or she is approached by a police officer, the presence of advice by the officer as to the person's legal status may well be an appropriate component of the equation. But this Court has never held that it is decisive. The Court has never required such a warning and indeed has specifically rejected the necessity of one. In *INS*

v. Delgado, 466 U.S. at 217, the Court left little room for debate on the point: "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." (Citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-34 (1973)). The Court stressed the same point in *Mendenhall*: "Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend on her having been so informed." 446 U.S. at 555. In the final analysis, the Ohio Supreme Court simply exceeded its authority in requiring police officers to make prophylactic warnings before all consensual encounters.

D. This Court Has Specifically Rejected The View That Questioning Alone Amounts To A "Seizure."

The Ohio Supreme Court also claimed that this Court's cases concerning consensual encounters were not applicable because a separate and illegal detention followed the initial and valid traffic stop of respondent Robinette. The court specifically found that the traffic stop ended when the officer determined he would not issue a ticket, making any later questioning the necessary product of an illegal detention. The short answer to this contention is that the request to search did not occur until after the police officer had returned Robinette's license. Thus, even assuming the officer held onto Robinette's license longer than he should have to conclude the traffic stop, the officer's critical requests for authority to search for contraband occurred well

after Robinette knew he was free to leave, as indeed he testified.

The real thrust of the lower court's decision, what amounts to the holding in the case, is the view that *any* questioning following a valid detention is necessarily so coercive as to refute any and all claims by police that a "consensual encounter" had occurred. As the court itself determined:

> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accoutrements of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Robinette, 73 Ohio St.3d at 655. As shown above, this view simply does not square with existing precedent on consensual encounters, and has the potential to threaten precedent establishing that mere questioning by one in authority is not sufficient to constitute a seizure.

"Since *Terry*," the Court has noted, "we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion), for example, we explained that 'law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.'" *Bostick*, 501 U.S.

at 434. *See also INS v. Delgado*, 466 U.S. at 215 ("What is apparent from *Royer* and *Brown* is that police questioning, by itself, is unlikely to result in a Fourth Amendmert violation"); *Florida v. Rodriquez*, 469 U.S. 1 (1984). Notwithstanding these precedents, the court below appears to have converted mere questioning after a traffic stop into a *per se* seizure. Thus, while the court below is careful to recognize the concept of a consensual encounter, its decision eviscerates the very premise upon which such encounters are based.

E. The Decision Below Will Substantially and Unnecessarily Restrict Drug Interdiction Efforts In Ohio And Possibly Other States.

As indicated in the Statement of Amici interest, the Amici States fear that the decision of the court below will have severe consequences for local drug interdiction efforts. Use of consensual encounters in drug interdiction occurs in numerous contexts -- road-side stops, buses, airports -- and has long been a critical and effective law enforcement tool. *See Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. Crim. L. 1109 (1992). In 1994 and 1995 alone, Ohio police officers initiated 408 criminal narcotic prosecutions based on consents to search. Similarly, between 1992 and 1995, in 20 cases in which consents were obtained in "car" cases, Highway Patrol officers confiscated drugs and currency worth $5,347,988. *See Appendix (*Report of S. Lt. W.D. Healy, December 11, 1995). Left unreviewed, the Ohio Supreme Court's is apt to diminish, if not destroy, successful law enforcement efforts like these in the future.

CONCLUSION

For the foregoing reasons, amici States respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

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State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
State Office Tower
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COUNSEL FOR AMICI STATES

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	
	:	CASE NO. 92-CR-2800
Plaintiff,	:	
	:	
v.	:	
	:	
ROBERT D. ROBINETTE,	:	
	:	
Defendant.	:	

BY MS. SORRELL:

Q. I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?

A Yes.

Q And you indicated that then he asked you whether or not you had contraband in the vehicle; is that correct?

A Yes.

Q And you -- and you obviously knew that you could answer that either yes or no; isn't that true?

A Yes.

Q And although you could have automatically said yes, that being the truth, you, in fact, said

automatically no; isn't that correct?

Mr. Ruppert: Objection.

The Court: Well -

Mr. Ruppert: that again goes to the merits of the issue. There are actually three answers; yes, no, and I don't know. Actually, four; I don't have to answer that.

The Court: Except that apparently this has to do with something that may be contained on the stipulated exhibit.

INTER-OFFICE COMMUNICATION

Date December 11, 1995 File No. 3CAS

Level General
To Major R.N. Rucker Attention _____

From S.Lt. W.D. Healy, TDIT Unit Coordinator

Subject-Consent to Search Cases involving Divisional Officers

---

On December 6, 1995, Carol O'Brien from the Ohio Attorney General's Office contacted me reference their need to have some statistical information from the Division concerning consent to search cases. The Ohio Attorney General's Office is filing an amicus brief with the United State Supreme court in support of an appeal filed by the Montgomery County Prosecutor (Mathias Heck) on the recently decided Ohio Supreme Court case entitled *State v. Robinette*. The Robinette case dealt with the Ohio Supreme Court's decision requiring law enforcement officers to inform a violator that they are "legally free to leave" prior to requesting a consent to search. The Ohio Attorney General's office would like the Ohio Supreme Court's decision to be reviewed and reversed by the United States Supreme Court; should they decide to grant certiorari and agree to hear the case.

Attached is a synopsis of twenty (20) significant drug or currency seizure cases over

the past 3 years involving TDIT personnel utilizing consent to search authority.

In addition, officers from throughout the state have initiated 408 criminal narcotics cases over the past two (2) years (1994 and 1995) in which consent to search was utilized to locate the narcotics. This information was obtained from the divisional Case Management Systems (CMS) maintained by the Office of Investigative Services.

This information was faxed to the Ohio Attorney General's Office for their use in assisting in the development of the amicus brief for the United States Supreme Court.

TRAFFIC AND DRUG INTERDICTION TEAMS (TDIT)

CONSENT TO SEARCH CASE INVESTIGATIONS

COCAINE SEIZURES:

DATE INCIDENT	AMOUNT	DESCRIPTION OF
8-21-94	19 pounds	Numerous drug courier indicators observed; consent to search was granted which revealed several screw heads around heater core to be extremely clean while the rest were dirty; housing around the heater core removed which revealed 19 pounds of cocaine.
10-18-92	5 pounds	Consent to search requested which revealed 5 pounds of cocaine under the rear seat.

MARIJUANA SEIZURES

DATE INCIDENT	AMOUNT	DESCRIPTION OF
1-27-93	622 pounds	Ryder rental truck; consent to search granted which revealed 622 pounds of marijuana in 16 U-haul

		cardboard boxes mixed in with used furniture.
4-24-95	267 pounds	Consent to search was granted which revealed 267 pounds of marijuana in a modified false compartment underneath the floor of the vehicle; compartment was made out of steel and ran the entire length of the Chevrolet Suburban passenger area.
6-19-93	158 pounds	Consent to search granted which revealed 158 pounds of marijuana in 4 large garbage bags in the trunk.
2-28-95	143 pounds	Consent to search granted which revealed the front door windows would not roll down; door panels were removed which revealed marijuana; a total of 143 pounds was found in various natural cavities of the vehicle.
7-31-94	110 pounds	Consent to search granted which revealed 110 pounds of marijuana inside luggage secured to the top of the vehicle and tied down with ropes and covered with a tarp.

1-10-94	101 pounds	Consent to search granted which revealed 101 pounds of marijuana in the trunk.
12-1-93	50 pounds	Consent to search was granted which revealed two (2) electronically controlled compartments in the rear seat arm rest panels which revealed 50 pounds of marijuana.
6-19-93	44 pounds	Consent to search was granted which revealed a hidden compartment in the vehicle's gas tank containing 44 pounds of marijuana.
6-8-93	40 pounds	Consent to search was granted which revealed 40 pounds of marijuana in 2 large suitcases and 1 duffel bag in the trunk.
3-16-94	33 pounds	Consent to search was granted which revealed 33 pounds of marijuana found in the natural cavities of the vehicle's quarter panel area.
3-30-95	10 pounds	Consent to search was granted which revealed 10 pounds of marijuana under the rear seat.

CURRENCY SEIZURES

DATE INCIDENT	AMOUNT	DESCRIPTION OF
4-13-94	$439,844.00	Consent to search granted which revealed a false door under the passenger compartment of the vehicle; a trap door was located under the rear seat and the compartment had $439,844.00 cash inside.
2-24-94	$67,400.00	Consent to search granted which revealed $67,400.00 cash in 13 separate envelopes and a loaded 9MM handgun in the passenger compartment
7-7-95	$37,000.00	Consent to search granted which revealed 3 electronic compartments in the back seat area; 2 of the compartments were empty; the other compartment was found in the right rear seat arm rest panel area and contained $37,000 cash.
2-3-93	$35,500.00	Consent to search granted which revealed $35,500.00 cash in the right rear door panel.

7-31-92	$30,600.00	Consent to search granted which revealed $30,600.00 cash in a shoe box on the back seat.
7-29-94	$30,399.00	Consent to search granted which revealed $30,399.00 cash in the back end of a Ryder rental truck mixed in with furniture and clothing.
3-10-93	$29,980.00	Consent to search granted which revealed $29,980.00 cash under the rear seat.

The following is a review on the total value of the seizures involving consent searches:

COCAINE	24 POUNDS	STREET VALUE
OF $1,090,900.00		
MARIJUANA	1,578 POUNDS	STREET VALUE
OF $3,586,365.00		
CURRENCY		VALUE
OF $6780,723.00		

TOTAL VALUE = $5,347,988.00

(7)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

v. *Petitioner,*

ROBERT D. ROBINETTE,

Respondent.

On Writ Of Certiorari
To The Ohio Supreme Court

JOINT APPENDIX

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Petition For Certiorari Filed December 5, 1995
Certiorari Granted March 4, 1996

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35pp

INDEX

The following opinions, decisions, judgements and orders have been omitted in printing the joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 18, 1992 – Indictment filed.

February 19, 1993 – Motion to Suppress filed.

February 26, 1993 – Hearing Held on Motion to Suppress.

March 8, 1993 – Decision of the Trial Court Overruling Robinette's Motion to Suppress filed.

April 15, 1994 – Final Entry filed by the Court of Appeals.

September 6, 1995 – Entry and Mandate of the Ohio Supreme Court.

THE STATE OF OHIO,
MONTGOMERY COUNTY
COURT OF COMMON PLEAS

Second Grand Jury
September Term, 1992

The State of Ohio

vs.

ROBERT D. ROBINETTE

INDICTMENT FOR

DRUG ABUSE

A TRUE BILL

/s/ James F. Mergler
Foreman of the Grand Jury

MATHIAS H. HECK, JR.
Prosecuting Att'y, Montgomery County

DIRECT

THE STATE OF OHIO, MONTGOMERY COUNTY

92-CR-2800

THE COURT OF COMMON PLEAS

Second Grand Jury September Term in the year Nineteen Hundred and Ninety-Two

(Filed Dec. 18, 1992)

MONTGOMERY COUNTY, ss.

THE GRAND JURORS of the County of Montgomery, in the name, and the authority of the State of Ohio, on their oaths do present and find that **ROBERT D. ROBINETTE,**

on or about the **3rd** *day of* **August** *in the year one thousand nine hundred and* **ninety-two** *in the County of Montgomery, aforesaid, and State of Ohio,* did knowingly possess a controlled substance, to-wit: **Metlylenedioxymethamphetamine (MDMA)**, a drug included in **Schedule I**; contrary to the form of the statute (in violation of Section 2925.11(A) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

Respectfully submitted,

MATHIAS H. HECK, JR.,
Prosecuting Attorney
Montgomery County, Ohio

By /s/ Linda F. Reed
Assistant Prosecuting Attorney
Supreme Court #0055286

"*NOTICE*: AS A RESULT OF THIS INDICTMENT, THE DEFENDANT MAY NOT KNOWINGLY ACQUIRE, HAVE, CARRY OR USE ANY FIREARM OR DANGEROUS ORDNANCE. SEE SECTION 2923.13 OF THE OHIO REVISED CODE."

JUDGE JOHN W. KESSLER **D(4)**

ORDER

TO: GARY HAINES, Sheriff
Montgomery County, Ohio

You are commanded by the court to notify

ROBERT D. ROBINETTE

2420 FOXHILL DRIVE

MIAMISBURG, OHIO 45342

THAT he has been indicted by the Grand Jury of Montgomery County and that each person named in the indictment is hereby ordered to personally appear at **8:30 A.M. on the 7th day of January, 1993** before the Honorable **JOHN M. MEAGHER** Judge of the Court of Common Pleas in **Courtroom No. 5** in the Courts Building at 41 North Perry Street, Dayton, Ohio; and that FAILURE TO APPEAR WILL RESULT IN A WARRANT FOR ARREST, FORFEITURE OF BOND, IF ANY, OR ADDITIONAL CRIMINAL CHARGES FOR FAILURE TO APPEAR UNDER R.C. 2937.99.

I certify that this is a true copy of the original indictment on file in this office.

PATRICK F. MEYER, Clerk
Court of Common Pleas,
Montgomery County

By _____

RETURN

On the date stated next to the name of the defendant(s) below, I served a duly certified copy of the within Indictment and Order for appearance by handing the same to said defendant(s).

GARY HAINES, Sheriff

Fees $ _____ By _____, *Deputy*

_____

IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	Case No. 14074
	:	(T.C. Case No. 92-CR-1800)
v.	:	
ROBERT D. ROBINETTE	:	**FINAL ENTRY**
Defendant-Appellant	:	

(Filed Apr. 15, 1994)

Pursuant to the opinion of this court rendered on the 15th day of April, 1994, the judgment of the trial court is ***Reversed***, and this cause is ***Remanded*** to the trial court for further proceedings consistent with the opinion of this court.

WILLIAM H. WOLFF, JR., Judge

/s/ Mike Fain
MIKE FAIN, Judge

/s/ Frederick N. Young
FREDERICK N. YOUNG, Judge

Copies mailed to:

CARLEY J. INGRAM
JAMES D. RUPPERT
HON. JOHN W. KESSLER

THE SUPREME COURT OF OHIO

1995 TERM

To wit: September 6, 1995

State of Ohio,	:	Case No. 94-1143
Appellant,	:	JUDGMENT ENTRY
v.	:	APPEAL FROM THE
Robert D. Robinette,	:	COURT OF APPEALS
Appellee.	:	

This cause, here on appeal from the Court of Appeals for Montgomery County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant his costs herein expended; and that a mandate be sent to the Court of Common Pleas for Montgomery County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery County for entry.

COSTS:

Docket Fee, $40.00, paid by Mathias H. Heck, Jr.

(Montgomery County Court of Appeals; No. 14074)

/s/ Thomas Moyer
THOMAS J. MOYER
Chief Justice

TRANSCRIPT OF TESTIMONY, SUPPRESSION HEARING

[p. 3] WHEREUPON, with counsel of record, defendant, and appropriate court personnel present, the proceedings commenced, to-wit:

The Court: Good morning, counselor.

Ms. Sorrell: Morning.

Mr. Ruppert: Morning:

The Court: This is Case 92-CR-2800. Caption is State of Ohio versus Robert Robinette. The matter is before the Court this morning for a hearing on a motion to suppress physical evidence and statements allegedly obtained from the defendant flowing from an arrest and a search.

Can we stipulate that any search that may have been conducted was conducted without a warrant?

Ms. Sorrell: Yes, Your Honor.

Mr. Rupert: Yes, Your [p. 4] Honor.

The Court: Very well. Counsel for the defendant is present, Mr. James Ruppert. Counsel for the State of Ohio, Ms. Janet Sorrell, is present.

Counsel ready to proceed?

Mr. Ruppert: We are ready, Your Honor.

Ms. Sorrell: State's ready, Your Honor.

The Court: Very well.

You may call your first witness then.

Ms. Sorrell: Thank you, Your Honor.

Prior to calling my first witness there are a couple preliminary matters.

The Court: Okay.

Ms. Sorrell: First, Your Honor, we have a videotape that is already set in the machine and Mr. Ruppert and I have agreed that we will stipulate to the videotape, that it is a fair and accurate portrayal of what occurred that night. It's a reproduction of the – of the videotape that was going in the patrol car at the time.

And the Court then could look at it at its [p. 5] leisure as opposed to this morning.

The Court: Stipulate to the admissibility of the video, Mr. Ruppert?

Mr. Ruppert: Yes, Your Honor, we will do that.

Ms. Sorrell: And the final item is, I have prepared a memorandum of law. I have previously given Mr. Ruppert a copy of it this morning. And that's the Court's copy.

The Court: Thank you.

Ms. Sorrell: And with that, I'll call Deputy Newsome to the stand.

The Court: All right.

ROGER NEWSOME,

sworn by the judge, testified as follows:

Mr. Newsome: I do.

The Court: Please be seated.

DIRECT EXAMINATION BY MS. SORREL:

Q Would you state your name and place of business, sir?

[p. 6] Roger Newsome. Sheriff's deputy with Montgomery County, Dayton, Ohio.

Q And how long have you been a deputy sheriff?

A Eleven years.

Q And what's your current duty assignment?

A Road patrol.

Q Were you on duty on August 3rd, 1992?

A Yes, I was.

Q And at that time, at approximately 20:29 hours, where were you stationed at?

A I was on Interstate 70.

Q And do you know a crossroad on Interstate 70 to give us a little better location?

A Close to mile post – let me correct that. Diamond Mill Road and Crestway. In between those two roads.

Q Okay.

And is that intersection located in Montgomery County, State of Ohio?

A Yes, it is.

Q And while you were on duty there, what did you observe?

A Uhm, as it pertains to this case, I observed a red Firebird traveling eastbound.

Uhm, I was sitting in a construction zone, speed [p. 7] limit 45 miles an hour, and I clocked this vehicle on radar at 69 miles per hour and proceeded to stop that vehicle.

Q Okay.

And do you know approximately where the vehicle stopped?

A In the vicinity of Crestway Drive.

Q And that stop would have been within Montgomery County, State of Ohio?

A Yes, it would

Q And at that time once the vehicle stopped, what did you do?

A I approached the driver and received his driver's license, I believe his registration, had him step to the rear of the car, discussed the reason I stopped him as being a speeding violation, the construction area up there at that time being 45 miles an hour, the orange barrels in place and so on. We were having quite a few accidents. Any violations, we were trying to stop to basically just slow the flow of traffic down.

I issued the driver, Mr. Robinette, a verbal warning for the speed and then handed his driver's license back to him.

Q And you indicated that the driver was Robert D. [p. 8] Robinette?

A Yes.

Q And do you see Mr. Robinette in the courtroom today?

A Yes, I do.

Q And can you tell the Court where he's seated and what he's wearing?

Mr. Rupert: We'll stipulate this is the driver of the automobile.

The Court: Very well.

Ms. Sorrell: Thank you.

BY MS. SORRELL:

Q At the time you gave Mr. Robinette this warning, were you located inside your patrol car, or outside, or where were you physically at?

A Outside my patrol car. Directly in front of it.

Q And were [sic] was he? Also outside the vehicle?

A Yes, he was.

Q Was there anyone else traveling with Mr. Robinette?

A Yes. He had a passenger.

Q And where was he?

A He was located in the pass – front seat, [p. 9] passenger side.

Q And up until this point in time, had you had any contact with the passenger?

A I don't believe I did.

Q And was Mr. Robinette seized in any way or under restraint in any way?

A No, ma'am.

Q After you gave Mr. Robinette the warning, what did you do?

A Like I say, I gave his driver's license back to him, and after I had completed the stop, I asked Mr. Robinette if he was carrying any contraband in his vehicle. He stated no. I then asked him if I could search his vehicle and the contents of his vehicle for possible contraband.

Q And what did he say?

A He said yes.

Q And what do you do then?

A Well, I had Mr. Robinette and his passenger, I believe, step up to the front of their vehicle.

Q And why was that?

A For my own safety.

Q Okay.

A And I proceeded to look inside the car.

Q Now, up until this point, had you ever done a [p. 10] frisk of Mr. Robinette?

A No, I hadn't.

Q And so then you proceeded to look into the car?

A Yes, I did.

Q And do you recall where in the car you started? Driver's side? Passenger side? Trunk? What type – what part of the car you started with?

A I really don't recall which side I started with. Uhm, I seem to remember that I started on the passenger side, but I don't – I'm not real sure.

Q Okay. Well, while you were searching, what, if anything, did you find?

A I found marijuana. I found two small plastic baggies, if I recall, with white residue in them, and I found a plastic clear – what appeared to be a film canister with some sort of a pill inside.

Q And did you show Mr. Robinette these items and tell him what you had found?

A Uhm, the only thing that I can remember actually showing Mr. Robinette was the pill.

Q Okay.

And do you recall what conversation you had with him regarding the pill?

A Well, I stepped back to my – when I – uhm, started to locating the contraband, I believe the [p. 11] marijuana was the first thing I found.

I then felt that I had probable cause to go to the rest of the route through the vehicle.

I had both subjects have a seat in the rear of my car and then I continued to search.

I later found the pill.

Uhm, I walked back to my patrol car and asked who the pill belonged to and Mr. Robinette said, "That's mine." And I said, "What is it" or something to that effect, and he said he would like to speak with his attorney before he answered anything.

Q Okay.

At any time did Mr. Robinette tell you he wanted you to not search the car? To stop your search?

A No. He never said stop.

Q And after you were informed that he wanted to speak to his attorney, did you ask him any more questions?

A No.

Other than name, address, and things like that, nothing to do with the case itself.

Ms. Sorrell: I have nothing further, Your Honor.

The Court: Cross examination?

[p. 12] Mr. Ruppert: Thank you, Your Honor.

CROSS EXAMINATION BY MR. RUPPERT:

Q Deputy, after you stopped Mr. Robinette's vehicle, as I understand it, you approached the driver's side and you asked for Mr. Robinette's license, did you not?

A That's the normal thing that I did. I – during that period of time, I was approaching on both sides of the

vehicle and I honestly don't remember if I went to the driver's side or the passenger side. I've never seen the videotape.

Q You haven't looked at that?

A No.

Q Well, the Court will have the benefit of that.

When you initially approached the vehicle to check with the driver, of course the only thing you had observed was the speeding violation; is that correct?

A That's correct.

Q And when you went up to Mr. Robinette to obtain whatever information you needed, you did not turn on the video camera, did you?

A That, I don't remember.

[p. 13] Q All right.

A I'm sorry. Go ahead.

Q Let me ask you to assume if the tape reflects that the video is started while Mr. Robinette is behind his vehicle, then I guess we can presume you did not start the tape before that.

A That's probably true.

Q All right.

Do you recall that when you obtained his license, you then returned to your vehicle before you got Mr. Robinette out of the vehicle?

A That could very well be, as well.

Like I say, I just don't remember.

Q And do you recall that, I take it if you would have done that, that what you were doing was calling in on his license?

A That, or turning the camera on, one or the other.

Q If the camera does not show you getting Mr. Robinette out of the vehicle, then I take it that you had to turn it off at some point after he was already out of the vehicle?

A That I turned it on?

Q That you turned it on after he was out of the vehicle.

[p. 14] A That could be so.

Q I'll represent that Mr. Robinette is standing to the rear of the vehicle when the tape first goes on.

A Okay.

Q At any rate, do you recall that after returning to your vehicle, you then returned to Mr. Robinette's car, removed him from the vehicle, and asked him to stand to the rear of his vehicle?

A That pretty much is the way I was running things at that time. Probably correct.

Q And do you recall that after doing that, you then returned again to your vehicle and turned the video camera on?

A I just can't remember. It's been so long ago, I just –

Q But, any rate, you agree that if Mr. Robinette is standing behind his vehicle when the video starts, you obviously had to turn it on after you got him out of the vehicle?

A Yeah. That's true.

Q When you – at what point did you determine that you were going to give Mr. Robinette a warning?

A Uhm, normally I was giving just everyone up there warnings. I pretty much knew I was going to give them a warning right when I stopped them.

[p. 15] We were having so many accidents up there. And when we stopped somebody it was slowing everyone else down.

And it's an area that I don't think they had construction actually going on at that time, but barrels were still up, the lights were still flashing, the speed limit hadn't changed, so I really didn't feel that handing out tickets was necessary.

Just if I could just slow folks down.

Q So at any rate, you determined – what point did you determine you were going to let him go, that you were going to issue a warning? Was that before you got him out of the vehicle?

A Unless there was something wrong with his driver's license or something out of the ordinary, a warning was what I was going to issue when I stopped him. I had meant to issue a warning.

Q You do recall that, in fact, you did issue a warning?

A I believe so.

Q What was the purpose of turning on the videotape?

A We record our stops. The program that I was in at the time was called highway drug interdiction, which we're out there looking for narcotics and we use the [p. 16] video camera to record the stops.

Q And do you normally turn on the video before you remove the occupants from the vehicle?

A As procedure, I try to turn it on – the way it's supposed to be wired up, as soon as the overhead lights come on, it comes on. In my case, my vehicle hadn't been set up that way and so it was a very small manual button that I had to push.

It could have been that I had – it happened to me several times where I thought the camera was on and discovered it was turned off.

I'm not sure if that's the case this time, but I had to turn the camera on manually.

Q So I take it if you had already determined in your mind that you were going to let Mr. Robinette go, and you turned the video camera on, I take it you already were aware that you were going to ask him questions about what he had in the vehicle?

A Right.

Q So you turned it on and you wanted to record the fact that you were going to ask him if he had anything illegal?

A Yes.

Q And then you asked – in fact, well, the tape will reflect that you had asked him if he was carrying [p. 17] any weapons of any kind, drugs, anything like that, and then you asked about the luggage that each of them had, did you not?

A I believe so.

Q All right.

When you did commence the search, I think you indicated the first thing that you observed, and I think the tape will reflect this, that you observed some marijuana in the console?

A I believe so.

Q And that was a small quantity of marijuana, was it not?

A I think so, yeah.

Q If the tape reflects that when you got back in your vehicle that you radioed in to another officer that you had an 18 M. Is that a minor misdemeanor?

A A misdemeanor.

Q After you initially started to search the vehicle and noted what you thought to be marijuana, you then placed both the driver as well as the passenger in your cruiser, did you not?

A I believe so.

Q You put them in the back of the cruiser?

A Right.

Q And you advised them that – you said they were [p. 18] not under arrest, but they were in the rear of your cruiser and they could not get out, could they?

A That's right.

Q And you indicated, I think, that they were under investigative detention?

A Right.

Q Thereafter, of course, you removed all of the luggage from the vehicle and searched all of the luggage as well as the console?

A Yes.

Q I think at some point then you radioed for another police officer?

A I believe I did.

Q And the only charge filed in this case was a result of an – apparently a small portion of some type of pill that you found in the container?

A I think so. Correct.

Mr. Ruppert: Thank you, Your Honor.

The Court: Any redirect?

Ms. Sorrell: Yes, Your Honor, just briefly.

[p. 19] **REDIRECT EXAMINATION BY MS. SORRELL:**

Q Officer, you indicated that you were on a drug interdiction team?

A Yes.

Q As part of that team, was it standard then if you made a traffic stop that you asked for permission to search the car?

A Yes.

Q Is that the routine way you handle things?

A Yes, it is.

Q When you did that, if a driver of the car had refused and told you no, what would have happened?

Mr. Ruppert: Objection.

The Court: If it's a question of procedure, we'll permit it.

Overruled. you may answer.

A If the driver indicated that he did not want me to search, I didn't. They were free to go.

BY MS. SURRELL:

Q And after you finished the search of this particular vehicle – uhm, you indicated that at one point they were under investigative detention?

[p. 20] A Right.

Q And once you had found your pill and you took that into your custody and control, what did you do with Mr. Robinette?

A I believe I placed him under arrest.

Q And do you know how his car left the area?

A By tow truck.

Ms. Sorrell: I have no further questions.

The Court: Any recross?

Mr. Ruppert: Nothing.

The Court: You may step down, officer.

You may call your next witness.

Ms. Sorrell: I have no further witnesses, Your Honor.

The Court: Anything from the defendant?

Mr. Ruppert: I'll call Mr. Robinette.

The Court: Very well.

* * *

[p. 21] **ROBERT D. ROBINETTE,**

duly sworn by the Judge, testified as follows:

Mr. Robinette: I do.

The Court: Please be seated.

DIRECT EXAMINATION BY MR. RUPPERT:

Q Would you state your name for the record, please, sir?

A Robert Dwayne Robinette.

Q And Mr. Robinette, when you were stopped on this day in question – uhm, could you tell us, did the Officer approach the vehicle from the driver's side?

A Yes, he did.

Q And when he first approached the vehicle, what did he ask for?

A Uhm, he asked for my driver's license.

Q Did he remain at the side of the vehicle or did he return to his cruiser?

A Then returned to his car.

Q And were you still seated in your vehicle?

A Yes.

[p. 22] Q All right.

And then at some point he returned back to the driver's side of the vehicle; is that correct?

A Yes.

Q And what did he then do?

A Then asked me to step out of the car.

Q And where did you go once you stepped out of the vehicle?

A Went back behind my car, between my car and his car.

Q Had the officer returned your license to you at that point in time?

A No.

Q Then what did the officer do once you were removed to the rear of your vehicle?

A Uhm, believe he asked me a few questions and then he asked me to wait there and returned to his car.

Q All right.

And what did he do inside his vehicle?

A I couldn't tell. Couldn't see.

Q This was a sunny afternoon in August, right?

A Yes.

Q How long did he remain in his cruiser?

A Uhm, maybe five minutes at the most.

Q And – uhm, I take it then he returned to where [p. 23] you were standing?

A Yes.

Q And did he indicate to you at that time that he was giving you a warning and that you were free to go?

A Yes, he did.

Q And then at that time, I think, as the tape will reflect, the officer asked you some questions about did you have any weapons of any kind, drugs, anything like that. Do you recall that question?

A Yes.

Q What was running through your head at that time?

A Uhm, surprised. I didn't know what – where he was coming from or what was going on or why he was asking me the question.

Q Did you in fact feel you were free to leave at that point?

A I thought I was.

Q And did you attempt to leave at that point?

A Uhm, I was beginning to. Yes.

Q All right.

And the officer apparently followed that – by the way, I think you indicated in response to his question that you were not carrying anything illegal; is that correct?

A Yes.

[p. 24] Q The officer then asked if he could search your vehicle. What went through your mind at that point in time?

A Uhm, I was stil' sort of shocked and I – I thought – I just automatically said yes.

Q Did – did you feel that you could refuse the officer?

A No.

Q All right.

Then after that, as I understand it, he removed the passenger from the vehicle, did he not?

A Yes.

Mr. Ruppert: That's all I have, Your Honor.

The Court: Cross examination?

Ms. Sorrell: Thank you, Your Honor.

CROSS EXAMINATION BY MS. SORRELL:

Q Mr. Robinette, you were traveling with another person; is that correct?

A Yes.

Q And where had you come from?

[p. 25] A From Chicago.

Q And you were traveling also sort of in tandem with another vehicle; is that true?

A Uhm, yes.

Q And what type of vehicle was that?

A Uhm, believe it was a Ford truck.

Q Pickup truck or –

A Yes.

Q Had you been anywhere prior to coming from Chicago? Did you say Chicago?

Mr. Ruppert: Objection.

The Court: Relevance, counselor? It's cross, but relevance?

Ms. Sorrell: I'll withdraw the question.

BY MS. SORRELL:

Q At the time that you were stopped by Deputy Newsome, isn't it true that at all times he was very nice to you?

A Yes.

Q And at no time did he ever draw his weapon or show any type of authority? Isn't that true?

A He didn't draw a weapon, no.

[p. 26] Q And your friend was always there with you in the car; is that correct?

A Yes.

Q Now, you knew, of course, that you had the marijuana in your in the car. Isn't that true?

Mr. Ruppert: Objection.

The Court: I assume this defendant's being called under the Simmons doctrine for the limited purpose of examining the probable cause for the search and/

or consent for the search and voluntariness of statements that may have been issued, as opposed to the issue of possession.

Is that a fair statement, counsel?

Mr. Ruppert: I'm sorry, Your Honor.

The Court: Is that a fair statement?

Mr. Ruppert: Yes, Your Honor. We're here on a motion only, and I don't think that merits of the case are proper for interrogation.

The Court: Ms. Sorrell, any response to that?

Ms. Sorrell: No. I'll withdraw the question, Your Honor.

[p. 27] **BY MS. SORRELL:**

Q I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?

A Yes.

Q And you indicated that then he asked you whether or not you had contraband in the vehicle; is that correct?

A Yes.

Q And you – and you obviously knew that you could answer that either yes or no; isn't that true?

A Yes.

Q And although you could have automatically said yes, that being the truth, you, in fact, said automatically no; isn't that correct?

Mr. Ruppert: Objection.

The Court: Well –

Mr. Ruppert: That again goes to the merits of the issue. There are actually three answers; yes, no, and I don't know. Actually, four; I don't have to answer that.

The Court: Except that apparently this has to do with something that may be contained on the stipulated exhibit.

[p. 28] From that standpoint it may be relevant to these issues.

We'll orverrule the objection in this instance. You may answer.

Do you want the question again?

BY MS. SORRELL:

Q Do you understand the –

Mr. Ruppert: Do you understand the question, Mr. Robinette?

A I'm not sure. I was being asked the question about the contraband. I didn't understand contraband. I wasn't sure. Firearms, I think he asked me about and I said yes. I automatically said no to these, to the question.

BY MS. SORRELL:

Q Do you understand that contraband also would have included illegal drugs?

A No.

Q You didn't know that at the time?

The Court: You have to answer that question.

[p. 29] A No. I didn't know that contraband was illegal drugs.

BY MS. SORRELL:

Q If the tape would indicate that the officer asked you about drugs, would that perhaps jog your memory? Do you recall if that was asked?

A Yes. I think he did ask about drugs.

Q And in fact, you knew that you did have drugs in the car. Isn't that correct?

Mr. Ruppert: Objection.

The Court: Sustained.

BY MS. SORRELL:

Q You indicated that you felt that you could not tell the officer not to search the car; is that correct?

A Yes.

Q And yet you knew that you could tell him you didn't want to answer any more questions. Isn't that correct?

A I didn't really think about that.

Q Wasn't it true that later in the conversation you refused to answer questions and you knew you had that [p. 30] right?

A Because he told me then that I had that right.

Q He had already told you that at that point?

A When I answered no, that I didn't want to answer any more, yes.

Q If I might have a moment, Your Honor.

Have you ever been stopped in the past for any type of driving offense?

A Uhm –

Mr. Ruppert: Objection.

The Court: Relevance, counsel?

Ms. Sorrell: Just to show or to find out, Your Honor, whether or not he has had prior contact with the police.

The Court: Overrule the objection. You may answer.

A I've been stopped for speeding tickets.

BY MS. SORRELL:

Q And so you knew basically the routine that most police officers follow when they stop you for a speeding violation?

A Yes.

[p. 31] Q And isn't it correct that Deputy Newsome followed pretty much the standard routine?

Mr. Ruppert: Objection. Don't know how this –

The Court: It would be speculation. Sustained.

BY MS. SORRELL:

Q At any time did you fear for your safety with Officer Newsome?

A No.

Q And how far have you gone in school, sir?

A Uhm, I have a college degree.

Q And what's that degree in?

A Uhm, it's a bachelor of science in botany.

Ms. Sorrell: I have no further questions, Your Honor.

The Court: Any redirect?

Mr. Ruppert: No, Your Honor.

The Court: You may step down.

Mr. Ruppert: Thank you, Mr. Robinette.

• • •

(8)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

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23pp

QUESTION PRESENTED

I. DOES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRE POLICE OFFICERS TO INFORM MOTORISTS, LAWFULLY STOPPED FOR TRAFFIC VIOLATIONS, THAT THE LEGAL DETENTION HAS CONCLUDED BEFORE ANY SUBSEQUENT INTERROGATION OR SEARCH WILL BE FOUND TO BE CONSENSUAL?

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The Decision of the Court of Appeals for Montgomery County, Ohio Second Appellate District, Case No. 14074, was entered on April 15, 1994, and is reproduced at App. 15-23 of the petition for Certiorari. It is unreported.

The Decision of the Common Pleas Court of Montgomery County, Ohio was filed on March 8, 1993 and is reproduced at App. 24-25 in the Petition for Certiorari. It is unreported.

JURISDICTION

The decision of the Ohio Supreme Court was entered on September 6, 1995. The petition for certiorari was filed on December 5, 1995. Certiorari was granted On March 4, 1995. Jurisdiction is invoked pursuant to 28 USC Sec. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment To The United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On December 18, 1992, Robert D. Robinette was charged by indictment in Common Pleas Court in Montgomery County, Ohio with one count of drug abuse, a felony of the fourth degree. His motion to suppress was overruled. He preserved his right to appeal by entering a plea of no contest. On appeal, the Court of Appeals for Montgomery County reversed. The Ohio Supreme Court affirmed the Court of Appeals. This Court granted Certiorari on March 4, 1996.

On August 3, 1992, Robert D. Robinette was stopped for speeding in a construction zone on Interstate 70, just outside of Dayton, Ohio, after Deputy Roger Newsome of the Montgomery County Sheriff's Office clocked him driving at 69 miles per hour in a posted 45 mile per hour zone. (Joint App., 10-11) Robinette, who was traveling back from a weekend in Chicago with a passenger, was 38 years old, possessed a bachelor of science degree in botany and lived in Montgomery County. (Joint App. 33, Joint Ex. A, Joint App. 9) Newsome asked Robinette to stand in front of his cruiser while he checked to see if Robinette's driver's license and registration were valid. (Joint App. 12-13, 25-26) Before returning

Robinette's license and registration, Newsome turned on a stationary videocamera inside of his cruiser and taped the rest of his exchange. (Joint App. 18-19, Joint Ex. A, Joint App. 9) This videotape was admitted into evidence at the suppression hearing. (Joint App. 9, Joint Ex. A)

In pertinent part, the conversation between Robinette and Newsome as reflected by the videotape was as follows:

> Officer Newsome: What do you do for a living?
>
> Mr. Robinette: I work for International Paper.
>
> Officer Newsome: Okay.
>
> Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?
>
> Mr. Robinette: I didn't see the sign was dropped down.
>
> Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.
>
> Mr. Robinette: Yeah (Remainder inaudible.)
>
> Officer Newsome: One question before you get gone; are you carrying any illegal contraband in your car?

(Mr. Robinette shakes head negatively)

Officer Newsome: Any weapons of any kind, drugs, anything like that?

(Mr. Robinette shakes head negatively)

Officer Newsome: Nothing like that? Okay.

Is all the luggage in there both yours and his?

(Mr. Robinette nods head)

Officer Newsome: All of it? Okay.

(Mr. Robinette nods head)

Officer Newsome: Would you mind if I search your car? Make sure there's nothing in there?

Mr. Robinette: No, go ahead.

Officer Newsome: Wouldn't have problem with it?

Mr. Robinette: No. (Joint Ex. A., Joint App. 9)

Newsome found a small amount of marijuana in Robinette's car, along with half of a tablet of "Ecstacy", a schedule I controlled substance the possession of which is a felony violation of Ohio Rev. Code 2925.11(A). (Joint App. 3, 14,)

Robinette testified at the hearing on the motion to suppress. On direct examination he testified that he believed that he was free to go as soon as Newsome returned his license. (Joint App. 26) When Newsome asked if he was carrying anything illegal in the car he

was surprised at the question. (Joint App. 26) When the officer asked if he could search the car, Robinette said that he was "still sort of shocked" and "just automatically" said yes. (Joint App. 26-27) On cross-examination Robinette reiterated that he believed that he was free to go when Newsome handed him his driver's license and registration. (Joint App. 29)

The trial court overruled Robinette's motion to suppress and found that the videotape demonstrated that Newsome had made it clear to Robinette that the traffic matter had been concluded before he asked him about contraband or weapons, that Newsome was not overbearing with Robinette and that Robinette's consent to search was voluntary and was not the product of duress or coercion.

The Court of Appeals reversed, holding that a reasonable person in Robinette's position would not have believed that he was free to go as long as the officer was asking investigative questions. Thus, Robinette's consent to the search was the product of an unlawful detention, and the contraband that was recovered was subject to suppression. One judge dissented, finding flawed the premise that a motorist could never voluntarily consent to a search of his car at the end of a traffic stop. The Ohio Supreme Court affirmed the Court of Appeals, and announced a bright-line test to be used in assessing the voluntariness of a motorist's consent to search that was obtained at the end of a traffic stop:

> The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining

> officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you are legally free to go" or words of similar import.

The question before this Court is whether a motorist's consent to a police officer to search his car, granted at the end of a lawful traffic stop, must be deemed in all cases to be involuntary unless the police officer has informed the motorist that the lawful detention has ended.

SUMMARY OF ARGUMENT

The Supreme Court of Ohio held below that the Fourth Amendment demands that an officer advise a motorist stopped for a traffic offense that he is free to go. Should the officer fail to do so, any subsequent cooperation by the motorist will be deemed to have been coerced, and any evidence found will be suppressed. This is the rule announced by the Ohio Supreme Court:

> The right, guaranteed by the federal and Ohio constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import. *State v. Robinette*, 73 Ohio St.3d 650 (1995).

In *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870 (1980), this Court held that a person is seized under the Fourth Amendment only when, in view of the totality of the circumstances, a reasonable person would not believe that he was free to go. Confronted with numerous opportunities to substitute a *per se* rule for the totality of the circumstances test, this Court has repeatedly held that it is only by consideration of the totality of the circumstances that the voluntariness of a citizen's cooperation can be determined. Furthermore, this Court has repeatedly held that warnings that a citizen need not remain or need not cooperate are not necessary to a finding of voluntary cooperation. Despite this clear precedent, the Ohio Supreme Court found that cautionary warnings must be given at the end of a lawful traffic stop. However, this Court has continued to apply the totality of the circumstances test in the context of the Fourth Amendment because it is particularly suited to accounting and weighing all the factors peculiar to any kind of police-citizen encounter. Thus, it was error for the Ohio Supreme Court to replace the totality of the circumstances test with a bright line rule, and its judgement should be reversed.

ARGUMENT

A. Introduction.

The Ohio Supreme Court has drawn a bright line separating valid seizures from illegal detentions by holding that the Fourth Amendment requires a police officer

to inform the motorist that he is free to go at the conclusion of a valid traffic stop. If the officer fails to give this warning, the motorist's subsequent cooperation with the officer – either in answering questions or allowing a search of his vehicle – will be irrebuttably presumed to be involuntary and any evidence found must be suppressed. In drawing this bright line, the Ohio Supreme Court defied the principle, established in an unbroken line of cases from this Court, that whether a person has been seized for purposes of the Fourth Amendment and whether a citizen's cooperation with an officer is voluntary must in all cases be measured by the totality of the circumstances, and that the presence or absence of any one factor, including advisory warnings that one need not cooperate, is not sufficient to answer the question of whether the person was seized or consent was voluntary.

The unreasonableness of creating a bright line test is perfectly illustrated by the outcome in this case. Robert D. Robinette was a 38 year old college graduate who admitted that he knew he was free to go as soon as the officer returned his driver's license and gave him a warning about speeding. The officer videotaped his request for consent and Robinette's answers, as well as the entire search, and the videotape was admitted into evidence. The trial judge considered all of the circumstances and found that Robinette's consent was voluntary. Yet, despite Robinette's admission that he knew he was free to go and the evident absence of coercion, the Ohio Supreme Court held that Robinette's consent must be deemed to be

involuntary because the officer did not tell him that he was free to go. This Court has rejected every attempt to replace the totality of the circumstances test with a bright line rule, and there is nothing so peculiar about a traffic stop that demands replacing the totality of the circumstances test with a bright line rule. As demonstrated herein, the Ohio Supreme Court erred in creating such a bright line test. Furthermore, the trial court's factual determination that Robinette's consent was voluntary and not the result of an illegal seizure must stand.

B. The Fourth Amendment Prohibition Against Unreasonable Searches And Seizures Has No Application To Consensual Encounters Between Police Officers And Citizens.

Mere questioning of an individual does not constitute a seizure, and even when an officer has no basis for suspecting a person of anything, he may generally approach and ask questions of the person, ask to examine the person's identification and request consent to search his or her luggage, as long as the police do not convey a message that compliance is required. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991). Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a

criminal prosecution his voluntary answers to such questions. *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324 (1983). If Robert Robinette voluntarily answered questions and allowed the search, there was no Fourth Amendment violation at all and the evidence is not subject to suppression.

C. The Totality Of The Circumstances Test Is The Appropriate Standard By Which To Measure Whether An Encounter Between A Police Officer And A Citizen Is A Seizure And Whether The Citizen's Cooperation With The Officer Is Voluntary.

1. This Court Has Refused To Apply Bright-Line Tests Or Per Se Rules To Determine Whether Any Encounter Between A Police Officer And A Citizen Is Consensual In Nature Or Is A Detention Which Must Be Supported By Objective Justification.

In *United States v. Mendenhall*, 466 U.S. 544, 100 S.Ct.1870 (1980), this Court held that a person has been seized within the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave. In endorsing the totality of the circumstances test, the Court found that the fact that the citizen was not told by the government agents that she need not cooperate did not necessarily mean that cooperation was involuntary. Since the decision in *Mendenhall*, this Court has

rejected every attempt to replace the totality of the circumstances standard with *per se* rules or bright-line tests.

In at least three instances since the decision in *Mendenhall*, this Court has rejected the idea that a *per se* or bright-line test should replace the totality of the circumstances test. In *Michigan v. Chesternut*, 486 U.S. 567, 572, 108 S.Ct. 1975, 1979 (1988), the Court declined the invitation to apply a bright-line test to determine whether an investigatory pursuit was a seizure:

> Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.

Again, in *Florida v. Bostick*, *supra*, at 439, 2382, the Court again forcefully rejected a *per se* rule created by the Florida Supreme Court presuming that every encounter between a police officer and a citizen occurring on a bus was a seizure:

> We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all of the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus. The Florida Supreme Court erred in adopting a *per se* rule.

And in *Florida v. Royer*, 460 U.S. 491, 506 103 S.Ct. 1319, 1329 (1983), a plurality opinion, Justice White rejected the idea that a bright line could be drawn to separate consensual encounters from Fourth Amendment seizures:

> We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

Thus, it is evident that after announcing the totality of the circumstances test in *United States v. Mendenhall, supra*, this Court has never countenanced the substitution of a bright-line test for the totality of the circumstances standard.

2. This Court Has Refused To Hold That A Citizen Must Be Warned That He Is Free To Leave Or To Refuse To Cooperate As A Necessary Condition Of A Consensual Encounter.

This Court has consistently refused to hold that the giving of cautionary warnings is a defining characteristic

of a consensual encounter or of voluntary cooperation. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973):

> [T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.

This view was echoed in *United States v. Mendenhall, supra*, at 555, 1878 where it was specifically observed that the voluntariness of Ms. Mendenhall's responses to the DEA agents who approached her in the airport did not depend upon her having been told that she did not have to cooperate. Similarly in *I.N.S. v. Delgado*, 466 U.S. 209, 216, 104 S. Ct. 1758, 1762 (1984), it was observed that:

> While most citizens will respond to a police request, the fact that people do so, and do so without being told that they are free not to respond, hardly eliminates the consensual nature of the response.

Nor does the requirement that an officer provide prophylactic warnings to a suspect in a custodial interrogation require that similar warnings be given and rights explicitly waived in the context of the Fourth Amendment. This argument was rejected in *Schneckloth v. Bustamonte*. Requiring the officer to give prophylactic warnings to a suspect about his constitutional rights prior to custodial interrogation and holding the state to a high

standard of proof of waiver of those rights were necessary to protect the fairness of the trial. In contrast, the protections of the Fourth Amendment have nothing to do with the fair ascertainment of truth at a criminal trial. Instead, the Fourth Amendment protects the security of one's privacy against arbitrary intrusion by the police. Thus, there is no likelihood of unreliability present in a search and seizure case, and it is not necessary to prove that the person who consented to a search knew of his right to refuse in order to protect the integrity of the fact finding process. *Id.*

As shown, this Court has always refused to hold that an officer must always advise a citizen that he need not cooperate in order to find that the encounter between the citizen and the officer was consensual.

3. The Totality Of The Circumstances Test, Which Looks To Context And Reasonableness And Which Has Always Been Applied To Distinguish Consensual Encounters Between Police Officers And Citizens From Those Which Are Non-Consensual, Requires That Appropriate Weight Be Accorded To All Of The Circumstances Presented In Any Such Encounter, And Is Sufficiently Flexible And Sensitive To Allow Appropriate Weight To Be Accorded To The Peculiar Characteristics Of Any Kind Of Police Citizen Encounter.

Emerging from the cases decided by this Court in the last 20 years is the principle that the totality of the

circumstances test, based as it is on context and reasonableness, is uniquely capable of distinguishing police detention from a consensual encounter and voluntary consent from coerced cooperation. This Court has repeatedly found that the traditional test is sufficiently flexible and sensitive to account for any aspect of a particular kind of encounter that might result in coerced cooperation. In *Florida v. Bostick, supra,* the concern was that the encounter occurred on a bus instead of a city street or airport, in *Michigan v. Chesternut, supra,* the concern was that it was an investigative pursuit and in *Schneckloth v. Bustamonte, supra,* the concern was the failure of the officer to alert the citizen that he could refuse consent to the search. Yet in each case this Court held that the totality of the circumstances must be applied to determine whether a seizure had occurred or consent was voluntary.

An explanation of the reasons that the traditional test is so well suited to the purpose appears in *Michigan v. Chesternut, supra,* at 573, 1979:

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.

This opinion also contains the observation that, while the test is flexible enough to be applied to the entire range of police conduct in an equally broad range of settings, it must be consistently applied from one police encounter to

the next, regardless of the particular person's response to the actions of the police:

> The test's objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. . . . This "reasonable person" standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached. *Id.* 574, 1979 (Interior citation omitted)

In this case the Ohio Supreme Court was concerned that the peculiar nature of traffic stops made citizens more vulnerable to police coercion:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle they are not legally obligated to allow.

State v. Robinette, supra, 654. But the Ohio court overlooked the fact that this Court addressed the concern that some encounters were more conducive to coercion than others in *Schneckloth v. Bustamonte, supra* at 229, 2049:

> In examining all the circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. The searches that are the product of police coercion can thus be filtered out without undermining

> the continuing validity of consent searches. In sum there is no reason for us to depart in the area of consent searches, from the traditional definition of voluntariness.

The Ohio Supreme Court failed to heed what this Court has taught – that the totality of the circumstances test is sufficiently sensitive and flexible to filter out those situations where the consent of the citizen is not voluntary. The unreasonableness of applying a bright-line test is illustrated by the outcome of this case. The defendant, who was 38 years old and had a college degree, testified that he believed he was free to go when the officer gave him back his license and registration. The encounter was filmed and the film admitted into evidence. The trial court found the search to be voluntary based on the totality of the circumstances. Nevertheless, the Ohio Supreme Court held that consent was not voluntary because the officer had not told the defendant he was free to go. This result defies logic and law.

Requiring police officers to advise motorists that detention has ended as a prerequisite to a finding of voluntary cooperation suggests that citizens cannot be trusted to know that they need not answer an officer's question or allow a search. The Ohio Supreme Court has demonstrated that it has no confidence that a citizen who has just received a traffic ticket or warning will say to the police officer "No, sir, you cannot search my car", or "Officer, you've given me my ticket, and I'm not going to stand here and answer any more of your questions." But in fact citizens frequently tell police officers just that, and refuse to answer questions and decline to allow a search of their cars. Furthermore, ordering police officers to

inform motorists that the legal detention is over betrays a belief that police officers, left to their own devices, will not honor the Fourth Amendment. But the videotape of the encounter between the officer and the citizen in this case shows that it is wrong to assume that police officers will coerce cooperation – there is nothing coercive in Officer Newsome's words or his conduct. Finally, by creating a bright-line rule the Ohio Supreme Court demonstrates that it does not trust trial judges to do what this Court has directed trial judges to do – to weigh the factors and circumstances to determine whether cooperation was in fact voluntary. But the decision of the trial court in this case is an illustration of how well the totality of the circumstances test works – in finding the consent to search voluntary, the trial judge observed that his initial reservations about the nature of the encounter had been overcome by seeing the interaction of the officer and the citizen on the videotape, and that based on what he saw in the videotape and the defendant's intelligence and education, consent was valid.

CONCLUSION

Whether or not an encounter between a police officer and a citizen is consensual must be determined by the totality of the circumstances. Thus the Ohio Supreme Court erred in creating a bright-line test to be applied whenever a police officer asks a motorist questions after the detention for a lawful traffic stop has ended. The Ohio Supreme Court's decision creating this bright-line test should be reversed and the judgment of the trial court, which was based upon the factual finding that

Robinette was not seized when he consented to the search of his automobile and his consent was voluntary, should be reinstated.

Respectfully submitted,

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QUESTION PRESENTED

CAN A STATE COURT REQUIRE POLICE OFFICERS TO INFORM MOTORISTS, LAWFULLY STOPPED FOR TRAFFIC VIOLATIONS, THAT "YOU ARE LEGALLY FREE TO GO" OR WORDS OF SIMILAR IMPORT, PRIOR TO ENGAGING IN FURTHER CONSENSUAL INTERROGATION?

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The Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 14, Article I of the Ohio Constitution

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

STATEMENT OF THE CASE

A. Statement of Facts

This case arises from the detention and subsequent search of the vehicle of Respondent, Robert D. Robinette (hereinafter "Respondent"). Deputy Sheriff Roger Newsome (hereinafter "Newsome") of the Montgomery County Sheriff's Office stopped Respondent for a speeding violation on Interstate Route 70 in Montgomery County, Ohio, on August 3, 1992. Newsome clocked Respondent's red Firebird vehicle at a speed of 69 miles per hour in a construction zone where the speed limit had been reduced to 45 miles per hour. (Jt. App. 10-11)

Newsome approached Respondent's vehicle on the driver's side and requested his license. Respondent complied and Newsome returned to his cruiser while Respondent remained seated in his vehicle. After determining that the license was valid and, knowing that he was only going to issue a warning, Newsome returned to Respondent's vehicle and asked him to step out and to the rear of his vehicle. Respondent complied and stood in between his vehicle and the cruiser while Newsome returned to the cruiser for the sole purpose of activating a video camera. Newsome retained Respondent's license during this period. (Jt. App. 16-18) According to Newsome, the only purpose for turning on the video camera in his cruiser was because he was a member of a drug interdiction patrol, and he wanted to record his questioning of Robinette regarding drugs, weapons and contraband. (Jt. App. 19)

After activating the video camera, Newsome returned to Respondent and warned him about the speeding violation. As Newsome issued his warning, he handed Respondent's license back, but continued the conversation as follows:

> Officer Newsome: Okay. Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?
>
> Robinette: I didn't see the sign was dropped down.
>
> Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets though.
>
> *One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?* (emphasis added)

See Appendix (*State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Transcript of Videotape, Joint Exhibit A, pages 3-4).

Respondent answered "no" to Newsome's question, whereupon Newsome inquired whether all the luggage in the car belonged to him and his passenger. Respondent replied that it did. Newsome then asked whether Respondent would mind if he searched the vehicle just to make sure nothing was in there. Respondent consented, as he felt he had no choice but to comply with Newsome's request. (Jt. App. 13, 19-21, 31) Respondent and his passenger were requested by Newsome to stand in front of Respondent's vehicle and face forward while Newsome searched. (Jt. App. 13)

Newsome stated he found a small quantity of marijuana on the car's console (although no charge was ever filed) whereupon he confined Respondent and his passenger in the back seat of his cruiser and indicated that they were under investigative detention. (Jt. App. 20-21) Newsome returned to the vehicle and resumed his search. He subsequently found one-half of a methamphetamine (MDMA) pill in a plastic film container in the vehicle. Respondent was then arrested. (Jt. App. 14-15) On December 18, 1992, Robinette was indicted and charged with possession under Ohio Revised Code section 2925.11(A), felony drug abuse.

B. The Trial Court's Ruling

On February 23, 1993, Honorable John B. Kessler of the Montgomery County Common Pleas Court held an evidentiary hearing to consider Respondent's motion to suppress all evidence seized as a result of the stop of his vehicle. The trial court heard testimony from Newsome and Respondent and also viewed the videotape of the encounter.

The trial court overruled Respondent's motion to suppress. Specifically, the trial court did not consider the issue of the scope of Robinette's detention, but focused solely on the validity of his consent to search. Subsequent to this ruling, Respondent entered a plea of no contest, was found guilty, and was sentenced. Respondent then pursued his right of appeal to the Montgomery County Court of Appeals, Second Appellate District of Ohio.

C. The Court of Appeals Decision

The Montgomery County Court of Appeals, Second Appellate District reversed the decision of the trial court in its opinion entered on April 15, 1994. The court of appeals properly focused its attention on the issue of the scope of Respondent's detention. Correctly recognizing that the issue of whether Respondent was seized at the time of his purported consent was a question of law, the court specifically rejected the trial court's finding and the State's argument that Respondent was free to go once the purpose of the traffic stop had been satisfied:

> We conclude that a reasonable person in Robinette's position would not believe that the investigative stop had been concluded, and that

> he or she was free to go, so long as the police officer continued to ask investigative questions.

(Decision, p. 3) The court of appeals determined that the search resulted from an illegal detention "and the fact that Robinette, during the unlawful detention, may have consented to the search is immaterial." (Decision, p. 4)

D. The Ohio Supreme Court Decision

The State of Ohio appealed the court of appeals decision to the Ohio Supreme Court. The Ohio Supreme Court, however, upheld the court of appeals' decision, holding that:

> When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.

State v. Robinette, 73 Ohio St.3d 650 (1995) (syllabus at 1).

In addition, recognizing the need to protect the right of Ohio motorists from purported consensual questioning during traffic stops, the Ohio Supreme Court imposed an advisory requirement upon law enforcement personnel:

> The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage

> in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

Robinette, 73 Ohio St.3d 510 (syllabus at 2). The State of Ohio has petitioned this Court to review the above holding.

SUMMARY OF ARGUMENT

The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution guarantee the right of the individual citizen to be secure against unreasonable searches and seizures. The issue of whether or not such a seizure has occurred is a question of law. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). It is undisputed that automobile stops are seizures within the meaning of the Fourth and Fourteenth Amendments and, as such, are subject to limitations: "in order to justify the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The Ohio Supreme Court correctly held that Respondent was still seized at the time his alleged consent to search was given to Deputy Newsome to search his vehicle. *State v. Robinette*, 73 Ohio St.3d 650 (1995). The court noted the validity of the initial seizure of Respondent for the speeding violation. However, the court determined

that the continued detention of Respondent for the sole purpose of questioning him about drugs, weapons, and contraband was entirely unrelated to the initial justification for the stop and, further, was not based upon any specific or articulable facts which would provide a basis for extending the scope of the initial seizure. *Id.* at 653. Thus, Respondent's purported consent to search his vehicle was vitiated as it was tainted by the illegal detention and was not the result of an independent act of free will. *Id.* at 654; *see Florida v. Royer*, 460 U.S. 491 (1983). The Ohio Supreme Court's holding comports with both federal and state law precedent and constitutes no error.

It was only **after** the Ohio Supreme Court held that Respondent's consent was invalid, because tainted by the illegal seizure, that the court went on to hold that an officer must advise a motorist that he is legally free to go before engaging in further interrogation of the motorist.[1] This holding is neither mandated by the Fourth Amendment or Section 14, Article I of the Ohio Constitution, nor is it prohibited by same. It represents a pragmatic response to a prevalent law enforcement technique currently being utilized in Ohio and elsewhere to turn each and every stop for a motor vehicle violation into a search

[1] The United States suggests in its Amicus brief that the determination that Respondent was unlawfully seized at the time of his purported consent is based in part upon the court's holding that an officer must advise a detained motorist that he is legally free to leave at the conclusion of the detention for the motor vehicle violation. This assertion is error. The court clearly determines the issues of the unlawful seizure and resulting tainted consent of Respondent before engaging in the analysis which forms the basis for its second syllabus holding.

for illegal drugs, weapons, and contraband, in the absence of any underlying justification for same.

The Ohio Supreme Court was correct in adopting such a requirement. The court addresses the ambiguity involved in determining at what point a valid detention transforms to a consensual encounter. The court's response necessarily takes into consideration the competing interests of a legitimate law enforcement technique versus the traveling motorist's right to continue unimpeded on his way once the reason for the traffic stop has been resolved. The requirement benefits both law enforcement officers and the traveling motorist. The requirement is not unduly burdensome and does not preclude officers from engaging in consensual encounters with motorists on the side of the road. However, the motorist will be clearly advised that the detention for the motor vehicle infraction has terminated, and he can then make his own decision whether or not to engage in further discourse with an officer.

Perhaps most importantly, the Ohio Supreme Court's holding is premised upon its own state constitution. Although Section 14, Article I of the Ohio Constitution mirrors the language found in the Fourth Amendment to the United States Constitution, this Court has repeatedly advised states that they may "construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." *California v. Greenwood*, 486 U.S. 35, 43 (1988). Ohio has acted in accord with this Court's precedent by imposing a minimal restraint on police conduct designed to protect the traveling motorist from an unreasonable interference

with his liberty. Respondent would thus urge this Court to uphold the decision of the Ohio Supreme Court.

ARGUMENT

I. ONCE AN OFFICER CLEARS THE BASIS FOR THE INITIAL DETENTION OF A MOTORIST, THE OFFICER MUST RELEASE THE MOTORIST ABSENT ANY PARTICULARIZED SUSPICION THAT THE MOTORIST HAS ENGAGED IN OR IS ABOUT TO ENGAGE IN CRIMINAL ACTIVITY, OR THE RESULTING CONTINUED DETENTION CONSTITUTES AN ILLEGAL SEIZURE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION.

The Fourth Amendment to the United States Constitution provides that each individual has a right to be secure against unreasonable searches and seizures. The Fourth Amendment thus guarantees to each individual " '[t]he security of one's privacy against arbitrary intrusion by the police.' " *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971). As recognized by the late Mr. Justice Frankfurter:

> The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process clause.

Wolf v. Colorado, 338 U.S. 25 (1949). The Ohio counterpart to the Fourth Amendment is found in Section 14, Article I of the Ohio Constitution, which likewise secures an individual's right to be free from unreasonable searches and seizures.

The issue of whether or not a seizure has occurred is a question of law. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A person has been "seized" within the purview of the Fourth Amendment "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* This Court has recently held that the ultimate questions of reasonable suspicion to stop and probable cause to make a warrantless search should be reviewed de novo. *Ornelas v. United States*, No. 95-5257 (decided May 28, 1996). Thus, an independent examination of the facts, findings, and the record may be undertaken by this Court to "determine for itself whether in the decision as to reasonableness the fundamental – i.e., constitutional – criteria established by this Court have been respected." *Ker v. California*, 374 U.S. 23, 24 (1963).

A. Once the initial basis for detaining a motorist has been resolved, an officer is required to release the motorist without further questioning unless the officer has a reasonable and articulable suspicion which would have justified further detention of the motorist.

Respondent was stopped by Deputy Newsome for a speeding violation. It is beyond dispute that this is an investigatory stop, which has been held by this Court to constitute a "seizure" within the meaning of the Fourth

and Fourteenth Amendments. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). People are not shorn of their Fourth Amendment rights "when they step from the sidewalks into their automobiles." *Prouse*, 440 U.S. at 663. While this Court has recognized that the purpose of such stops is limited and the resulting detention brief (when compared to formal custodial interrogation), this Court remains mindful of the proscriptions contained in the Fourth Amendment which "impose a standard of reasonableness upon the exercise of discretion by government officials." *Id.* at 654-55. This Court has also noted that such stops involve a show of authority, interfere with the motorist's freedom of movement, and may create substantial anxiety. *Id.* at 657.

The law with regard to investigatory stops was established by this Court in the seminal case of *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* represented a great departure from this Court's prior requirement that in order to detain an individual, a police officer needed to have probable cause to suspect criminal activity. *See Dunaway v. New York*, 442 U.S. 200, 207-09 (1979) (prior to *Terry*, any restraint of a person amounting to a seizure was invalid unless justified by probable cause). The majority in *Terry* recognized that some departure was necessary in order to safeguard law enforcement personnel in carrying out their functions. *Terry*, 392 U.S. at 23-24. However, the exception is a limited one: The central tenet of *Terry* provides that "in order to justify the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational

inferences from those facts, reasonably warrant that intrusion." *Terry* , 392 U.S. at 21.

Since *Terry*, it has been acknowledged by this Court that a traffic stop is more analogous to an investigative detention or "*Terry* stop" than a custodial arrest. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). The reasons for this analogy are twofold: (1) the presumptively "temporary and brief" nature of the stop; and (2) the circumstances, including the exposure to public view, are not such as to make the motorist believe he is "completely at the mercy of the police." *Id.* at 437-38; *see also Prouse*, 440 U.S. at 653. However, the Court does acknowledge that a traffic stop "significantly curtails" the "freedom of action" of a motorist. *Berkemer*, 468 U.S. at 436.

Terry requires a dual analysis to determine: (1) whether the police officer's action was justified at the inception of the stop, and (2) whether the officer's action at issue was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry*, 392 U.S. at 20; *see also Pennsylvania v. Mimms*, 434 U.S. 106, 113-14 (1977) (Marshall, J., dissenting). Evidence "may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Terry*, 392 U.S. at 29.

It is conceded in this case that the initial stop of Respondent was justifiable. Newsome pulled Respondent over for a speeding violation: he was traveling at a speed of 69 miles per hour in a 45 mile per hour construction zone on an interstate highway. (Jt. App. 11) Thus, Newsome's actions comport with the first inquiry of the Terry

analysis: Newsome had a reasonable and articulable suspicion that Respondent was violating the speed limit. However, Newsome's subsequent actions in removing Respondent from his vehicle, inquiring about illegal contraband, and his request to search Respondent's vehicle fail to comport with the second inquiry of the Terry analysis.

From the inception of the stop, Newsome testified that he was only going to issue a warning citation to Respondent. (Jt. App. 18) Therefore, when Newsome returned to Respondent's vehicle after checking his license, he had fully investigated the basis for the traffic infraction and had resolved the basis for the stop. All Newsome needed to do was to return Respondent's license, issue his warning, and inform him that he was free to go on his way. However, as noted by the Ohio Supreme Court:

> Instead, for no reason related to the speeding violation, and based on no articulable facts, Newsome extended his detention of Robinette by ordering him out of the vehicle. Newsome retained Robinette's license and told Robinette to stand in front of the cruiser. Newsome then returned to the cruiser and activated the video camera in order to record his questioning of Robinette whether he was carrying any contraband in the vehicle.

State v. Robinette, 73 Ohio St.3d 650, 653 (1995). It is at this point that Newsome oversteps his authority and arbitrarily intrudes upon Respondent's privacy. The mere fact that Newsome had a reasonable and articulable suspicion that Robinette had been speeding did not entitle him "to

turn a routine traffic stop into a fishing expedition for unrelated criminal activity." *Id.* at 655. Once Newsome had resolved the basis for the stop of Respondent, he was required to release him, with or without issuing a citation, in the absence of any further reasonable suspicion that he was transporting drugs, weapons, or contraband. The record is simply devoid of any testimony from Newsome which provides a reasonable basis for his continued detention of Respondent.

B. The continued detention of a motorist after the initial basis for a traffic stop has been investigated and cleared constitutes an unreasonable seizure in contravention of the Fourth and Fourteenth Amendments to the United States Constitution and Section 14, Article I of the Ohio Constitution.

The Fourth Amendment prohibits even momentary seizures without reasonable and objective grounds for doing so. *Florida v. Royer*, 460 U.S. 491, 498. *Terry* mandates that even where a temporary detention is permissible, that detention is severely limited. As unequivocally set forth by this Court, "reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop." *Royer*, 460 U.S. at 498 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975)). Thus, unless a basis for further detention and investigation develops during the initial detention, a police officer must circumscribe his questioning to the basis for the original stop. Further, "the investigative detention must be temporary and last no longer

than is necessary to effectuate the purpose of the stop." *Id.* at 500.

These are not novel rules of law. Their justification may be found in the myriad of cases which have come before this Court on the issue of unreasonable searches and seizures. At bottom, however, the justification for such rules requires a balancing of the individual's right to be free of arbitrary government intrusion against the government's intrusion upon this right. This Court must remain mindful, however, of the potential for abuse of such detentions. If police officers are allowed to convert all *Terry* stops into "consensual" interrogations about matters which are unrelated to the basis for the initial detention, then there is no meaningful limitation left to *Terry* and the exception thus swallows the rule. *See Royer*, 460 U.S. at 510 (Brennan, J., dissenting in the result). The time and scope limitations imposed by *Terry* no longer exist to protect the individual from arbitrary government intrusion upon his protected Fourth Amendment rights.

The danger of abuse, specifically with regard to traffic stops, has been noted by other courts. For example, Sixth Circuit authority allows a police officer to pull over vehicles for traffic infractions, however slight, even if the officer's real purpose for the stop is the hope that narcotics or other contraband may be found as a result of the stop. *See United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993) (en banc), *cert. denied*, 115 S.Ct. 97 (1994). Such broad authority was, however, not enough to sustain the search of a vehicle in *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995). In *Mesa*, the defendant was stopped for speeding. The officer requested Mesa's license, which she had to retrieve from the trunk of her Cadillac vehicle.

Rather than having her return to her own vehicle, the officer instructed Mesa to sit in the back of the cruiser while he ran a license check. Once in the cruiser, she was informed that only a warning would be issued. Mesa then answered a number of questions regarding her age, license and destination. The officer exited his cruiser and approached Mesa's vehicle to ask Mesa's passenger a few questions and then returned to the cruiser. He finished writing his warning citation, and Mesa signed it. Instead of allowing Mesa to exit his cruiser, however, he then asked Mesa additional questions, totally unrelated to the initial traffic stop but, rather, focusing on whether Mesa had any weapons or drugs in her car. Mesa responded negatively, but the officer asked whether she would mind if he searched. Mesa consented and later signed a written consent to search form.

Judge Guy, writing for the Sixth Circuit, found this search to constitute an abuse of police authority. In Judge Guy's words:

> The rationale behind our decision in Ferguson was not to authorize "fishing expeditions," no matter how well-intentioned, by police agencies. Rather, it was premised on the proposition that the judicial branch of government should not dictate to the executive branch the manner in which it carries out its enforcement function as to the laws passed by the legislature. Since we have extended this authority to the broadest extent possible, however, we have a duty to see that the authority is not abused. Under the circumstances presented here, we feel that the authority was abused. As we will spell out in more detail, if this search can pass muster, then police authorities have a license to search almost

> every vehicle that they have reason to stop on the highway, with or without consent of its owner or occupant.

Id. at 162. The court specifically found that once the purpose of the initial traffic stop had been concluded, the officer could not detain the driver further "unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." *Id.* The court found insignificant the officer's claimed discrepancy between Mesa's and her sister's explanation as to where they were traveling. *Id.* Further, the court found that the alleged nervousness of Mesa was an insufficient basis upon which to support a further detention, especially given the fact that Mesa was seated in the backseat of the officer's cruiser from the inception of the stop. Judge Guy thus concluded that this was a simple case "in which the officer crossed over the line of permissible conduct subsequent to a legitimate traffic stop. . . . " *Id.* at 163.

Newsome stepped over this same "line of impermissible conduct" when he removed Respondent from his vehicle for the sole purpose of conducting his questioning of him with regard to illegal contraband. Newsome had cleared the basis for his initial stop of Respondent upon running a check of his license and finding no outstanding violations. His testimony indicated that he intended only to give a warning to Respondent from the time he stopped him. (Jt. App. 18) He indicated that intent to Respondent on videotape. Unlike *Mesa*, Newsome did not testify as to any facts that aroused his suspicion about Respondent such as would warrant a further detention. Therefore, once the warning was given and, in the

absence of any particularized suspicion that Respondent was engaged in other criminal activity, Newsome was required to release him.

Newsome's conduct in this case alone, however, does not tell the entire story. Newsome's actions were also at issue in the case of *State v. Retherford*, 93 Ohio App.3d 586 (Ohio Ct. App. 1994). In *Retherford*, Newsome admitted to requesting consent to search vehicles "as a matter of course" in approximately 786 traffic stops in 1992 **alone**. *Id.* at 594 n.3. Newsome further proclaimed that "all" of the cars he stopped for a traffic violation while he was on drug interdiction patrol would be searched "more so for any other reason the fact that I need the practice, to be quite honest." *Id.* at 596. The Second Appellate District of Ohio specifically noted that police agencies in Ohio were instructing officers to seek consent routinely of individuals stopped for motor vehicle violations to search for drugs, weapons, and money "even when the officer has little or no suspicion that the occupants of the vehicle are engaged in any criminal activity whatsoever, or that the vehicle itself contains any contraband." *Id.* at 593-94. The stop of Respondent is but one of Newsome's stops in 1992. If this officer's actions are illustrative of other police agency practices, it requires little imagination to determine that this figure multiplied by the numerous law enforcement agencies across the nation who utilize this tactic yields a staggering number of citizens being "asked to relinquish their privacy rights in the name of 'voluntary cooperation' with the government. . . . " *Id.* Indeed, the fact that thirty-six states have joined in the

Amicus Brief of the Ohio Attorney General may be indicative of just how widespread the intrusion upon the traveling public has become.

The Ohio Supreme Court and the Second Ohio Appellate District have recognized this tactic exactly for what it is. In the words, of the Second Ohio Appellate District:

> [the officer's] "freeing" of [Robinette] was merely a pre-arranged ploy to attempt to end the "seizure" so that the Deputy could interrogate [Robinette] and obtain [his] consent to search based on nothing more than the slightest "inchoate" and "unparticularized" hunch that [he] might be transporting contraband.

Id. at 599. Searches based on such inchoate and unparticularized suspicions and hunches are the exact evils sought to be deterred by the Fourth Amendment. *See Terry*, 392 U.S. at 27. Thus, unlawful detentions that result in such searches and seizures contravene the Fourth Amendment's proscription against unreasonable searches and seizures: "The very thought of American citizens, not suspected of any wrongdoing, being asked by the police to search their cars and luggage before exercising their right to drive the highways of this state is clearly repugnant to American institutions and ideals." *Retherford*, 93 Ohio App.3d at 596.

In times of widespread drug use and drug trafficking, the values sought to be protected by the Fourth Amendment might seem to be nothing more than esoteric or extravagant ideals when weighed against the societal pressure to halt such activity. *See Coolidge v. New Hampshire*, 403 U.S. at 455. This pressure makes it easy for law

enforcement politicos to urge sacrifice of these fundamental constitutional values in the war against drugs. It is equally clear that many traffic stops, such as the stop of Respondent, never come to the attention of the courts. Indeed, it is only where questionable practices are subjected to constitutional scrutiny through the judicial process that cases make it to this Court for review. However, this does not diminish the importance of protecting these fundamental constitutional values. As so aptly stated by Mr. Justice Jackson:

> But the right to be secure against searches and seizures is one of the most difficult to protect. . . . Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). It is for these compelling reasons that this Court must scrutinize the type of tactics being utilized by law enforcement personnel in the name of voluntary cooperation. It is for these same reasons that once an officer has investigated and cleared the basis for an initial traffic detention that the detained individual must be

released in the absence of any further reasonable and particularized information which would justify further detention. Fourth Amendment values must not be forsaken in order that the government might "more effectively wage a 'war on drugs' ". *See Florida v. Bostick*, 501 U.S. 429, 439 (1991).

II. AT THE TIME OF RESPONDENT'S PURPORTED CONSENT TO SEARCH, THE OFFICER DID NOT HAVE A REASONABLE JUSTIFICATION TO CONTINUE THE DETENTION OF RESPONDENT.

It is undisputed that Newsome did not have any reasonable and articulable suspicion to justify Respondent's removal from his vehicle and to subsequently question him about drugs, weapons, or contraband. There was absolutely no evidence of any unlawful activity other than a speeding violation. There was no testimony by Newsome at the suppression hearing that Respondent fit any drug courier profiles, no testimony that anything about him made Newsome suspicious that he was transporting drugs or contraband, nor was there any physical evidence at the scene that Respondent was a drug trafficker. The only testimony from Newsome was that he routinely asked permission to search **all** vehicles he pulled over for motor vehicle violations.[2]

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[2] *Compare Retherford, supra*, wherein Newsome testified that there were several indicators which made him suspicious that Retherford was carrying contraband, e.g., luggage in the back seat, Retherford's nervousness, and the fact that she was traveling from Cincinnati to Port Clinton, Ohio. 93 Ohio App.3d at 591. Ironically, the *Retherford* court also noted that in another

A routine practice is not a permissible basis upon which to seek to detain motorists in order to impermissibly broaden the scope of an investigative detention. Rather, a reasonable and articulable suspicion of criminal activity is required. General suspicion is insufficient. *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam). "[D]emand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see also Terry*, 392 U.S. at 21 n.18. In the absence of such specificity of information, the state was required to prove that Respondent's consent was, in fact, voluntary and not the result of an unreasonable detention.

A. Consent tainted by an unlawful detention is invalid as a matter of law.

Consent produced as a result of an illegal detention is vitiated as a matter of law. *Florida v. Royer*, 460 U.S. 491, 507-08. "Statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will." *Id.* at 501. It is Respondent's contention that his consent to search is invalid as a matter of law, pursuant to *Royer*, because he was being illegally detained by Newsome at the time his purported consent was given. The state can overcome this invalidity **only** through proof that the consent was not

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case involving this same officer, his suspicions were aroused because the detainee's luggage was located in his trunk! *Id.* n.1.

the product of an illegal detention but, rather, was Respondent's independent act of free will. *Id.* While this Court has opined that there is no "litmus-paper test" for distinguishing a consensual encounter from an illegal seizure, one point is crystal clear: where the validity of a search rests on consent, the state bears the burden of "proving that the necessary consent was obtained and that it was given freely and voluntarily." *Id.*; *see also Bumper v. North Carolina*, 391 U.S. 543 (1968). This burden of proof "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49.

A police stop of a motor vehicle constitutes a significant intrusion and is clearly a seizure within both the meaning of the Fourth Amendment and the Ohio Constitution. Newsome activated his lights and siren in order to pull Respondent over. Respondent was questioned as to his travels and was subsequently issued a warning citation for speeding. A reasonable person certainly would not have felt free to walk away during this period of time. What subsequently transpired between Respondent and Newsome, however, is distinct from cases in which the encounter between the officer and the citizen can be characterized as "consensual".

This Court has noted that an officer is free to ask questions so long as he does not convey the message that compliance with his request is mandatory or required. *Bostick*, 501 U.S. at 437; *see also Mendenhall*, 446 U.S. at 554 (seizure may be indicated by "use of language or tone of voice indicating that compliance with the officer's

request might be compelled"). The message of compliance, however, is the exact message conveyed by Newsome to Respondent:

> Officer Newsome: Okay. Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?
>
> Mr. Robinette: I didn't see the sign was dropped down.
>
> Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.
>
> One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that? (emphasis added)

See App. at pp. 2-3. The clear impact of Newsome's question is that **before** Respondent is free to go, he must answer this question:

> Newsome tells Robinette that before he leaves Newsome wants to know whether Robinette is carrying any contraband. Newsome does not ask if he may ask a question, he simply asks it, implying that Robinette must respond before he may leave. The interrogation then continues. Robinette is never told that he is free to go or that he may answer the question at his option.

Robinette, 73 Ohio St.3d at 654-55.

From Respondent's point of view, it appears unrealistic for Petitioner to argue that Respondent, as a reasonable person, would have felt free to leave at this point. Indeed, it "strains credulity" to think that a motorist, after being pulled over by an armed and uniformed officer, would feel at liberty to ignore the police presence and walk away when confronted by investigatory questions about illegal contraband, followed by a request to search his vehicle for same. *See Retherford*, 93 Ohio App.3d at 599. It is undisputed that Newsome never informed Respondent that he was free to leave. "Certainly few motorists would feel free . . . to leave the scene of a traffic stop without being told they might do so." *Berkemer*, 468 U.S. at 436.

It becomes clear when one views the videotape of this encounter that at the time Newsome begins to issue his warning to Respondent, there is one unending conversation, without any break between the warning for speeding, Newsome's comments about the amount of accidents that had occurred along the particular stretch of highway, the questioning about illegal drugs, weapons, or contraband, and the request for consent to search the vehicle. Petitioner would rely on Respondent's admission that he thought he was free to leave at the time the officer handed his license back. (Jt. App. 29) Respondent's subjective belief was instantaneously replaced with the contrary thought when Newsome continued his inquiry without interruption: "Before you get gone . . . . " Respondent further testified that he felt he could **not** decline the officer's request to search his vehicle, thus belying Petitioner's claim that Respondent knew he was

free to go at the time his license was returned to him. (Jt. App. 27, 31)

The tape clearly reveals that Newsome did not cease speaking to Respondent from the time he handed him his license until the request for consent was made. The entire exchange, including Newsome's inquiry and request for consent to search, was completed in a matter of seconds, "a time period clearly insufficient by itself to break the causal link and to allow free will to flourish." *United States v. Sandoval*, 29 F.3d 537, 544 (10th Cir. 1994). Respondent never made any move to leave during this time. Thus, it is highly unlikely that Respondent or any other reasonable person who is being addressed by a police officer feels free to take his license and walk away and leave the officer there to prattle on to thin air.

Much has been made of Newsome's posture, his tone of voice, and the fact that he requested, not ordered, Robinette to consent. If Newsome had ordered Respondent to consent, the consent would not be voluntary as it would clearly constitute no more than acquiescence to a show of lawful authority. *Bumper, supra*. It is undisputed that Newsome is a police deputy, complete with uniform and gun who had legally pulled Respondent over for speeding. It is not necessary that an officer be belligerent or overbearing or have his gun trained on the motorist for a court to find that a seizure has occurred. Indeed, one corollary to the assertion that Newsome was not overbearing is to suggest that it is permissible for an officer to interrogate a detained motorist about drugs, weapons, and contraband and request consent to search his vehicle with absolutely no underlying basis, so long as the officer presents an unthreatening demeanor to the

detainee. To accept such a proposition is to erode the protections of the Fourth Amendment to a point where they become nonexistent.

When Newsome completed his warning, all he had to do was hand Respondent's license back and inform him he was free to go, something Newsome admitted doing many times before in stops like this. *See Retherford*, 93 Ohio App.3d at 591. Instead, he removed Respondent from his vehicle and required him to stand to the rear of his vehicle while he returned to his cruiser to activate the video camera. He then asked Respondent questions about drugs, weapons, and contraband, beginning with "Before you get gone . . . . ", implying that Respondent must respond to his questions before he can get on his way. The United States urges that this indicated that Newsome's questioning would soon cease. But, therein lies the admission that Respondent was **not** free to go nor, as a reasonable person, could he feel that he was free to go at the time the alleged consent was given. Thus, the Ohio Supreme Court was correct in affirming the legal conclusion of the court of appeals that the consent was not voluntary but, rather, was tainted by the continuing unreasonable and illegal detention. The finding is supported by the fact that Respondent never made any attempt to leave nor was there any significant break in the action surrounding the stop which would purge the taint of the illegal detention.

B. Even if this Court can reasonably accept the premise that Respondent consented to the search of his vehicle, the alleged consent was no more than a submission to a lawful authority and, as such, is insufficient to establish an unequivocal, specific and voluntary consent.

Even if this Court accepts Petitioner's claim that Respondent "consented" to the search of his vehicle, this consent is vitiated because it was not unequivocally, freely and voluntarily given. Respondent merely acquiesced in the officer's suggestion to search his vehicle. Acquiescence indicates passivity or a lack of resistance, rather than an independent act of free will.

Schneckloth mandates a totality of circumstances test when looking at the purported voluntariness of consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *Bumper* states that consent is not voluntary when it is the mere submission to a show of lawful authority. Petitioner argues that the entire exchange between Newsome and Respondent with regard to illegal activities was a consensual encounter. Petitioner places great weight on the fact that Respondent was a 38-year-old college graduate, and invites this Court to presume that as a hypothetical reasonable person, he thus knew all of the constitutional rights he could assert in the face of Newsome's request. Petitioner also invites this Court to conclude that Respondent knew he was free to leave at the time he was questioned about illegal drugs and his "consent" obtained. Such a conclusion is unwarranted.

Newsome's own testimony reveals that the only reason the videotape was activated in this case was to record his questioning of Respondent as to drugs, weapons, and

contraband. (Jt. App. 19-20) The actual videotaped sequence of the speeding warning, the questioning about drugs, weapons, and contraband, and the request for consent constitutes one, uninterrupted sequence, during which at no time could Respondent reasonably have felt free to ignore the officer and walk away. The videotape demonstrates the fallacy of the Petitioner's argument, as well as the error of the trial court's finding that the officer had made it clear to Respondent that the traffic matter was concluded. Petitioner points out that Respondent testified he thought he was free to leave because the officer had handed him his license and informed him he was getting a warning for speeding. However, with no lapse in the conversation, Newsome launches into a question totally unrelated to a speeding violation. Respondent's response: he was shocked and surprised, **and felt that he was not free to decline the officer's request for consent to search.**[3] (Jt. App. 26-27, 31) (emphasis added).

If, pursuant to *Schneckloth*, one is to examine the totality of circumstances in this case, that examination must include the following factors: (1) Respondent was detained solely for a speeding violation; (2) a check of Respondent's license revealed no outstanding violations; (3) Respondent was removed from his vehicle for no reason other than to record Newsome's drug interdiction activities; (4) Newsome testified to no factors which aroused his suspicions that Respondent was carrying

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[3] *Compare Retherford, supra*, wherein Newsome specifically testified that he informed Retherford that she was free to go before requesting consent to search. 93 Ohio App.3d at 591.

drugs, weapons, or contraband; (5) Newsome's questioning and request for consent came while Respondent was still being detained by the officer on the side of the road and after he was asked to exit his vehicle so the questioning could be videotaped; (6) the questioning and request for consent occurred after the initial basis for the traffic stop had been resolved; (7) the request from Newsome was not presented to Respondent as a real option but, rather, Newsome infers that he must answer before he leaves Newsome's presence; (8) the request for consent to search follows immediately upon the heels of a question about illegal drugs, weapons, and contraband, a question totally unrelated to the purpose of the original traffic stop; (9) the questioning and request to consent are made without the benefit of any advice to Respondent that he was free to go, could refuse to answer any questions, or could refuse to consent to a search; and (10) the search is undertaken by Newsome without any written consent to search form. These are the facts that Petitioner and Amici want to ignore, because a careful examination of these facts reveals that what the state claims is a totally "consensual" encounter is nothing more than a subterfuge engaged in by law enforcement officers in order to subtly coerce detained motorists into granting consent to search their vehicles.

This "ploy" was very well rehearsed as Newsome was trained to give a motorist's documents back while, at the same time, continuing a "casual conversation" which invariably culminated with questioning about drugs, weapons, or contraband, followed immediately by a request to search the motorist's vehicle. *See Retherford*, 93 Ohio App.3d at 590-91. Here, as in *Royer*, the primary

goal of Newsome's conversation was **not** in having such a conversation with Respondent but, rather, in investigating the contents of Respondent's vehicle, a matter totally unrelated to the purpose of the original stop and for which there was no underlying basis. *Royer*, 460 U.S. at 505. The motorist, who may have believed she was free to go a moment before, is suddenly confronted with a request to search for no reason other than "routine".

Petitioner seizes upon this momentary illusion of freedom to justify what subsequently occurred as a totally consensual encounter. However, the phrasing of the question implies that the motorist cannot leave before answering. The request for consent to search clearly implies the officer's disbelief of the motorist's negative answer. The officer, who moments before issued a warning or citation for a motor vehicle violation, retains the upper hand and the accoutrements of authority during this time. It is highly unlikely that the reasonable person in this situation would feel free to leave. The resulting "consent," if obtained, thus constitutes no more than submission to the officer's authority, insufficient as a matter of law to constitute an unequivocal and freely given consent.

III. THE REQUIREMENT OF ADVICE FROM A LAW ENFORCEMENT OFFICER TO A DETAINED MOTORIST AT THE CONCLUSION OF A TRAFFIC STOP THAT THE MOTORIST IS LEGALLY FREE TO GO IS NOT PROHIBITED UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION OR SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION.

The Ohio Supreme Court took the opportunity in *Robinette* to establish what it termed a "bright line"

between the conclusion of a valid seizure and the beginning of a consensual exchange in the context of a motor vehicle stop. The underlying rationale for this rule was expressed by the court as follows:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.
>
> . . .
>
> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Robinette, 73 Ohio St.3d at 654-55. The court thus held that an officer is required to inform a detained motorist that he or she is legally free to go at the conclusion of a traffic stop. The requirement imposed upon law enforcement officers is not repugnant to either the federal Constitution or the Ohio Constitution. It merely provides a demarcation between the detention and any potential subsequent consensual exchange.

A. The warning requirement imposed by the Ohio Supreme Court does not create an impermissible single factor test.

Petitioner and Amici assert that the warning requirement imposed by the Ohio Supreme Court creates a single factor test. Thus, if the warning is not given, any consent obtained by an officer will be irrebuttably presumed to be involuntary. In Petitioner's opinion, the rule eviscerates the consensual encounter doctrine. That argument should initially be dispelled by the Ohio Supreme Court opinion itself as the court noted the importance of consensual encounters as a constitutional, investigative tool. *Robinette*, 73 Ohio St.3d at 655. The court held that where a motorist has been seized pursuant to a traffic stop, and the purpose of the traffic stop has been completed, the motorist must be advised that he or she is legally free to go **before** any attempt at consensual interrogation begins. The ruling is a pragmatic response to a technique being utilized routinely by law enforcement officers in Ohio and across the nation to illegally broaden the scope of valid detentions for traffic violations, a technique designed to turn every motor vehicle stop into a search for illegal drugs, weapons, and contraband.

Nevertheless, Petitioner and Amici argue that this Court has consistently rejected bright line rules in the context of Fourth Amendment jurisprudence. In support of their arguments, Petitioner and Amici rely upon cases in which they maintain such rules were struck down by this Court. *See Florida v. Bostick*, 501 U.S. 429 (1991); *Michigan v. Chesternut*, 486 U.S. 567 (1988). This Court did strike down overbroad holdings of other State courts in both of these cases. However, these were cases in which

the respective state court holdings involved all-or-nothing propositions of law.[4] For example, in *Bostick*, this Court struck down the holding of the Florida Supreme Court that **all** bus searches were unconstitutional seizures under the Fourth Amendment.[5] In *Chesternut*, this Court struck down a Michigan Court of Appeals' holding that **all** investigatory pursuits were seizures for purposes of Fourth Amendment protections.

The Ohio Supreme Court's holding recognizes the constitutional precedents of this Court that an officer cannot legally detain a motorist, in the absence of any

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[4] In addition, unlike prior cases, the case at bar involves a lawful seizure followed by a seamless transition to a full blown search **unrelated** to the purpose of the seizure. Unlike prior precedent, the issue before the Court is whether Respondent's unlawful detention thereby rendered his subsequent "consent" invalid.

[5] There is a further important distinction between *Bostick* and the case at bar. In *Bostick*, no factual determination was made by the Florida Supreme Court as to whether or not a seizure had occurred, independent of its conclusion that solely because the confrontation arose on a bus, there was an automatic seizure. The Ohio Supreme Court, however, made an independent factual determination that Respondent was seized at the time his purported consent was given. Only after this determination was made did the court move on to consider the inherent ambiguity involved in a traffic stop where the detained motorist is confronted with questions about illegal contraband followed by a request to search his vehicle. It is at this point that the Ohio Supreme Court opts to afford protection to the motorist to secure him against an unreasonable search by placing a requirement on the officer to advise the motorist he is legally free to travel on prior to engaging in any further interrogation for which the officer has no basis other than a "hunch".

particularized suspicion as to further criminal activity. The underpinning of its holding necessarily realizes that although the officer's action may have been justifiable at its inception, e.g., a moving violation, the officer's subsequent actions must be sufficiently related in scope to the circumstances which justified the officer's interference in the first place. Absent this relationship or any new and particularized information that warrants further detention, an officer is thus required to inform the motorist that he is free to go. The officer may then choose to engage in a further exchange with the motorist, question the motorist about contraband, or request to search the motorist's vehicle. However, the motorist has now been alerted and does not have to question the fact that he need not remain to speak further with the officer if he does not desire to do so.

Petitioner attempts to liken this case exclusively to *Schneckloth* in claiming that a right to refuse consent has never been found to be the only factor in assessing the voluntariness of consent. This proposition entirely misses the rationale behind the holding in *Robinette*. The requirement set forth by the Ohio Supreme Court is not a test for assessing the voluntariness of consent. Therefore, the required statement does not run afoul of *Schneckloth*. The advice merely informs the motorist that he is free to go. The advice is to the individual himself and is therefore not akin to the *per se* rules struck down in *Bostick* and *Chesternut* that all police action of a certain type constitutes an illegal seizure.[6] The question is not, as Petitioner

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[6] The Ohio Supreme Court recognized both the compelling interest of the citizen and the officer in a situation where, once

suggests, whether the Fourth Amendment mandates that such a statement be made by the officer but, rather, whether such advice is consistent with the constitutional criteria previously advanced by this Court.

The holding is not designed to supplant the totality of circumstances test of *Schneckloth* with a single, bright-line rule for assessing the voluntariness of consent. If that were the case, the Ohio Supreme Court could have mandated a detailed warning, akin to *Miranda*, encompassing the right to leave the scene, the right to refuse to answer further questions, and the right to refuse to consent to a search of the vehicle. This is not a "right to refuse consent" holding. Respondent would note, however, that this Court has consistently found significant the fact that a person was informed of his right not to consent in assessing the voluntariness of that consent. For example, in *United States v. Mendenhall*, Justice Stewart opined:

> [I]t is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it. Although the Constitution does not require "proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search" [Schneckloth v. Bustamonte, supra], at 234 (footnote omitted), such knowledge was highly relevant to the determination that there had been consent. And, perhaps more important for present

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lawfully detained for a traffic offense, the officer broadens the scope of the inquiry. The initial contact, although valid, is not consensual, the motorist having been "ordered" to the side of the road by lights and sirens.

> purposes, the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive.

446 U.S. at 558-59. *Mendenhall* was distinguished in *Royer* as follows:

> In *Mendenhall*, no luggage was involved, the ticket and identification were immediately returned, and officers **were careful to advise that the suspect could decline to be searched.** Here, the officers seized Royer's luggage **and made no effort to advise him that he need not consent to the search.** (Emphasis added)

Royer, 460 U.S. at 503-04 n.9. Similarly, in *Florida v. Bostick*, this Court also found significant the fact that "the police specifically advised Bostick that he had the right to refuse consent." 501 U.S. at 432. *See also Florida v. Jimeno*, 500 U.S. 248 (1991) (officer advised Jimeno that he had reason to believe Jimeno was carrying narcotics, asked permission to search, and informed Jimeno that he did not have to consent to a search of the vehicle). The reason this Court has found such advice to be significant is to dispel the belief that the person who allegedly consents was coerced into same by a law enforcement officer. That same rationale supports the Ohio Supreme Court's ruling in *Robinette*, especially in the context of motor vehicle stops, considering the emphasis law enforcement has apparently placed upon drug interdiction efforts on America's highways.

The Ohio Supreme Court specifically notes in its decision that a consensual encounter which follows

closely on the heels of a valid detention "is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all." *Robinette*, 73 Ohio St.3d at 655. The court is not so concerned with the fact of the consent itself as it is with establishing some type of demarcation between a detention and a consensual encounter **for the benefit of motorists** who are routinely being confronted with requests to search their vehicles. The Ohio Supreme Court determined, and rightfully so, that the ordinary motorist has a right to be free from unreasonable searches and seizures. The imposition of the advisory requirement on law enforcement personnel does nothing more than protect that right.

The United States, as Amicus, urges that factors other than being informed that one is free to leave may bear decisively upon whether a reasonable person would feel free to leave. United States Brief at 18. According to the United States, these factors include whether the officer has returned the motorist's documents, whether the officer has "completed the traffic stop" by issuing a warning or ticket, whether the officer displays accoutrements of authority, and the officer's statements, tone, position, and manner towards the motorist. However, when one reviews the cases cited by the United States in support of its totality of the circumstances argument, it is clear that at least the Tenth Circuit has determined that return of a driver's documents are "necessary" before that Circuit will find that a seizure has terminated. *See e.g., United States v. Lee*, 73 F.3d 1034 (10th Cir. 1996) (driver still seized at time consent obtained as deputy still possessed driver's documentation); *United States v. Sandoval*, 29 F.3d

537 (10th Cir. 1994) ("We have also considered as a necessary (but not always sufficient) condition of the termination of the seizure the officer's return of such documentation . . . . "); *United States v. Werking*, 915 F.2d 1404 (10th Cir. 1990) (investigative detention was concluded when papers were returned to detained driver). Thus, the Tenth Circuit has apparently drawn its own unchallenged "bright line" for determining whether or not a seizure has ended.

Even more interesting is the United States' citation of *United States v. Rivera*, 906 F.2d 319 (7th Cir. 1989). In *Rivera*, the court found that Rivera was not seized at the time the trooper informed him of the drug interdiction effort, asked him about drugs, weapons, and contraband, and requested consent to search. The Seventh Circuit found it very significant that Rivera "had all his identification, **he was told that the investigation was over**, he was free to leave at his pleasure and, indeed, was leaving when the trooper popped the question of consensual search." *Id.* at 323. As Rivera had been given his "cue to leave," the court found that the detention relating to the traffic offense was over. *Id.* No such "cue to leave" was given to Respondent in the case at bar.

Waiver of an individual's fundamental right to be free of unreasonable searches and seizures must not be taken lightly. Citizens cannot "meaningfully be said to have waived something so precious as a constitutional guarantee without ever being aware of its existence." *Schneckloth*, 412 U.S. at 277 (Brennan, J., dissenting). The advisory requirement is **not** a "Miranda-like" warning as urged by Amici but, rather, is a very simple phrase: "At this time, you are legally free to go." It is, however, a

prophylactic rule, as acknowledged by Petitioner and its supporting Amici, in the sense that it is designed to defend or guard against an unreasonable interference with the citizen's liberty.[7]

This rule does not prohibit an officer from then inquiring of the individual whether or not they are carrying any illegal drugs, weapons, or contraband. Indeed, there may be times within the context of a legal detention wherein questioning about matters unrelated to the initial stop may be permissible based upon an officer's observations, which give rise to some new particularized suspicion that the detained individual is engaged in other criminal activity. The required advice also does not prevent an officer from obtaining the motorist's consent to search his vehicle. The advice does clarify for the citizen that the detention has ended, by making the motorist aware that he or she is free to leave and does not have to suffer further questioning at the unfettered whim of a law enforcement officer. The statement thus comports in every sense with the constitutional criteria previously advanced by this Court.

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[7] Such a rule is not different in its objective than the exclusionary rule set forth by this Court in *Mapp v. Ohio*, 367 U.S. 654 (1961) or the warning requirement enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966). *See also* Brief of Amicus, Ohio Association of Criminal Defense Lawyers, at pp. 12-13.

B. The warning requirement imposed by the Ohio Supreme Court does not place an undue burden upon law enforcement officers, nor does it interfere with their right to make consensual inquiries of a person detained for a traffic violation.

The requirement imposed by the Ohio Supreme Court is quite simple: "At this time, you are legally free to go" (or words of similar import). The statement must be made by the officer at the conclusion of a detention for a motor vehicle violation. Amici, however, would elevate this simple requirement to the level of Miranda warnings required to be given to a person who has been taken into custody or arrested by a police officer. Quite simply, the state court requirement falls far short of such a warning.

Petitioner and Amici cite *Florida v. Royer* for the proposition that consensual encounters between police and citizens do not implicate any Fourth Amendment rights:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, **by asking him if he is willing to answer some questions**, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

460 U.S. at 497. However, there are some important distinctions between the *Royer* factual scenario and the facts of this case. Newsome did not just approach Respondent on a street somewhere and ask him **whether** he would be willing to answer some questions before putting the questions to him. Respondent was clearly seized by Newsome within the meaning of the Fourth Amendment and the

Ohio Constitution. Newsome, knowing that the purpose of his stop of Respondent had been completed, removed him from his vehicle, placed him in front of a video camera, and issued his warning for speeding. Then, without any further justification and under the guise of a "consensual encounter," Newsome proceeded to question him about drugs, weapons, and contraband. The phrasing of the question is such that Respondent is compelled to answer **before** he leaves. In the face of Respondent's negative answer, Newsome then requests permission to search his vehicle. The reasonable inference to be drawn is that the officer does not believe Respondent, therefore a search is necessary.

The concern eloquently expressed by the Ohio Supreme Court is how to delineate for its citizens when the detention has ended, thus recognizing the privacy rights of the traveling public, as well as the legitimate interests of law enforcement. The United States suggests that it is unreasonable to place such a "burdensome and mechanical" requirement upon a law enforcement officer. It is not unreasonable, however, nor is it burdensome to require that a state's sworn officers protect a citizen's constitutionally guaranteed rights. What is unreasonable is the fiction indulged in by Petitioner and Amici that the imposition of this requirement is a burdensome and mechanical requirement to place on law enforcement personnel. Further, it is disingenuous to urge ignorance of an individual's constitutional rights as an effective law enforcement tool. The Fourth Amendment addresses specifically the rights of "the people," not the rights of law enforcement personnel. While many individuals

know generally that they are possessed of certain constitutional rights, most could not enumerate those rights nor could they state the parameters of those rights. The Ohio Supreme Court holding clarifies the parameters of a citizen's right to be free of unreasonable searches and/or seizures following detention for a motor vehicle violation.

The Fourth Amendment and its counterpart under the Ohio Constitution are designed to protect the people against arbitrary governmental intrusions, not vice versa. The burden to insure against such intrusions was originally placed upon law enforcement in the earlier decisions of this Court by requiring that the police have probable cause to question an individual before detaining him. Probable case was whittled away into the stop and frisk doctrine of *Terry*. That doctrine was then expanded into other contexts such as the motor vehicle stop, considered a seizure for purposes of Fourth Amendment analysis. *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *Delaware v. Prouse*, 440 U.S. 648 (1979). Under that line of cases, law enforcement personnel are permitted to stop and question an individual, however, their right to do so is limited: they must have a reasonable and articulable reason for doing so.

Recent cases, however, seem to have shifted the burden of insuring against arbitrary governmental intrusions from the state to the citizen. In cases such as *Mendenhall*, this Court has suggested that whether or not a seizure has occurred depends upon the totality of circumstances and whether the mythical objective reasonable person would have felt free to leave. *See Mendenhall*, 446 U.S. at 554. In a *Mendenhall* world, a police officer is allowed to

accost an individual, ask questions in a noncoercive manner, and the citizen is supposed to know that she is free to ignore the officer and walk away. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258, 1300-01 (1990). Thus, the burden has been shifted to the individual to protect her own rights. In the real world, however, it is unlikely, if not unrealistic, to assume that a detained individual will feel free to ignore an officer and walk away. *Id.* at 1301; *see also Berkemer*, 468 U.S. at 436.

It is not suggested that the consensual encounter doctrine plays no part in effective law enforcement, however, there are some distinctions to be drawn between the rationale in cases such as *Mendenhall* and *Royer* and the type of traffic stop at issue in this case. In a *Royer* world, the officer approaches the individual on the street or elsewhere and first asks an individual **whether or not** she is willing to answer some questions. The question itself alerts the individual to ask herself this question: "Do I have to answer these questions?" If verbalized to the officer, the officer must then truthfully respond, "No, you do not have to and you are free to go." (quite similar to the requirement imposed by the Ohio Supreme Court). The request by the officer in a *Royer* case has not been preceded by a detention caused by the person's own acts in violating the law and thus is deemed by this Court to be truly consensual thus implicating no Fourth Amendment concerns.

In a traffic stop case, however, there is an initial detention which is normally valid based upon the perceived traffic infraction. It is well-settled by this Court that the detention is a seizure for Fourth Amendment

purposes. See *Berkemer, supra*, 468 U.S. 420 (traffic stop akin to *Terry* stop). However, there are parameters for such stops, e.g., reasonable and articulable suspicion of criminal wrongdoing. If no further reason for questioning becomes apparent during the traffic stop, then the detained motorist must be allowed to travel on. It is when the documents are returned, citations or warnings are issued, the conversation continues, and a request for consent is made that questions such as that in the case at bar arise. The motorist, who momentarily may have thought he was free to travel on after receiving his warning or citation, is suddenly confronted with the officer's unfounded suspicion that he is engaged in some other type of illegal activity. He has been asked to consent to a search of his vehicle and possessions for some reason unapparent to him.

Petitioner maintains that the Ohio Supreme Court's holding demonstrates no confidence in the citizen and demonstrates a belief that officers, left to their own devices, will not honor the Fourth Amendment. Depending upon the sophistication of the motorist, however, he is placed in a position of compromise. While one motorist may simply decline and take the risk that he will walk away with no further action taken by the officer, another motorist, however, may be placed in the position of waiving Fourth Amendment rights, of which he may well be unaware, under what some courts will determine in hindsight was no more than "voluntary cooperation" with the officer. However, it is without question that the officer retains the upper hand during the entire timespan of the stop. There is nothing to prevent the officer from changing a warning to a citation should the motorist decline.

Should the motorist decline, there is nothing to prevent the officer from citing the motorist for other minor or technical violations that might have been overlooked had the motorist consented. If the motorist has a prior criminal record, he may believe that if he does not consent, further action may be taken against him. These concerns underscore both the necessity and practicality of advising a motorist that the detention for the moving violation is over. The ordinary citizen should not have to be a constitutional scholar as a prerequisite to exercising his right to travel the highways and in maintaining his right of privacy.

The Ohio Attorney General, as Amicus, fears that the decision of the Ohio Supreme Court will have severe consequences for local drug interdiction efforts. In support of its argument, Amicus contends that in 1994 and 1995 alone, Ohio police officers instituted 408 narcotics prosecutions based upon evidence obtained via consent searches. The Attorney General also claims that between 1992 and 1995, in twenty (20) cases in which consent was sought from motorists ("car" cases), Ohio Highway Patrol officers confiscated drugs and currency worth $5,347,988. The Attorney General's brief is notably silent about the hundreds, perhaps thousands, of cases in which vehicles were searched under the guise of "voluntary cooperation" and at the inconvenience of the motorist where no contraband, weapons, currency, or drugs were found. This result-oriented argument provides no insight to the underlying constitutional inquiry. It does, however, remind us of the mindset of police agencies who are more concerned with results (quantity and value seized) than with constitutional guarantees. These police guideposts

are indicative of "the end justifies the means" mentality, a concept that is totally foreign to our system of justice.

Whether or not the consensual encounter doctrine is an effective law enforcement technique is not at the heart of this case and, even if it were, "the effectiveness of a law-enforcement technique is not proof of its constitutionality." *Bostick*, 501 U.S. at 40 (Marshall, J., dissenting). The Ohio Attorney General and the United States would elevate the Ohio Supreme Court's ruling to a mandate against the consensual encounter doctrine, but that simply is not the case. The bottom line is that the holding does not preclude utilization of the consensual encounter to ferret out drug-related activity on the highway. It only requires that the officer advise the motorist that the motor vehicle infraction has been disposed of before launching into new and uncharted waters.

C. A state may interpret its own state constitution so as to provide its citizens with greater protection of the fundamental right to be free of unreasonable searches and seizures without offending federal Fourth Amendment jurisprudence.

The Ohio Supreme Court premised its holding in this case upon both the Fourth and Fourteenth Amendments to the United States Constitution, as well as Section 14, Article I of the Ohio Constitution. This Court has repeatedly advised state courts that they may construe their own constitutions to provide broader individual liberties than those provided under the federal Constitution. For example, in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982), this Court noted that:

> [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.

Likewise, this Court has advised state courts that they may "construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." *California v. Greenwood*, 486 U.S. 35, 43 (1988). *See also Michigan v. Long* 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (state may provide greater protection to one of its citizens than some other state may provide or than this Court may require throughout the country).

The Ohio Supreme Court has also recognized this premise in the context of individual rights:

> The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Arnold v. Cleveland, 67 Ohio St.3d 35 (1993) (syllabus at 1). The advisory requirement imposed by the *Robinette* court does nothing more than provide greater protection to Ohio motorists pursuant to Ohio's state constitution.

The right guaranteed to the individual is the right to be free of unreasonable searches and seizures. That right is protected by Section 14, Article I of the Ohio Constitution. The issue addressed by the Ohio Supreme Court below is how best to protect the right of motorists in Ohio to be free from such unreasonable searches and/or seizures when the search follows an initial detention for a motor vehicle infraction. The Ohio Supreme Court was fully aware of the widespread practice of officers in Ohio to seek consent to search without any basis during the course of a routine stop for a motor vehicle violation. The determination of the Ohio Supreme Court is that the motorist is best protected by being informed. Thus, it imposed a requirement on officers that they must inform a motorist, at the conclusion of the traffic matter, that the motorist is legally free to leave.

Respondent joins fully in the Amicus brief filed on his behalf by the Ohio Association of Criminal Defense Lawyers with regard to the existence of an adequate and independent state ground as the underlying basis for the Ohio Supreme Court's holding. Twice, within the body of its opinion, the Ohio Supreme Court found its rule to be warranted by the Ohio Constitution. The holding does not deprive an individual of an important constitutional privilege or right. Rather, it protects the fundamental right to be free of unreasonable searches and/or seizures, a right embodied in the Ohio Constitution. Certainly, the Ohio Supreme Court is empowered to interpret its own Constitution to "overprotect" this fundamental right.

CONCLUSION

This Court constitutes our foremost judicial authority on fundamental constitutional guarantees. No right is held to be more sacred in our society than the right to be secure in one's privacy against arbitrary intrusion by the police. However, such arbitrary intrusion lies at the very heart of the police practice at issue, a practice which allows law enforcement officers to turn every routine motor vehicle stop into a full blown search for unrelated criminal activity without articulating any basis therefor. The Ohio Supreme Court correctly determined that Respondent was still seized at the time his purported consent was given and held that his consent was thus ineffective as a matter of law. The Ohio Supreme Court further recognized the arbitrary nature of exposing a motorist to such an unreasonable and unjustified interference with his liberty before being allowed to proceed on his way after a motor vehicle violation. In order to protect the motorist from this unreasonable and unjustified interference, the court imposed a warning requirement upon law enforcement officers. The decision of the Ohio Supreme Court is not offensive to either the federal or Ohio constitutions and, as such, the decision should be affirmed by this Court.

Respectfully submitted,

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APPENDIX

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

-vs- Case No. 92-CR-2800

ROBERT D. ROBINETTE,

Defendant.

TRANSCRIPT OF VIDEOTAPE

of JOINT EXHIBIT A, a videotape, in the proceedings that came before the Honorable John B. Kessler, Judge, on the 26th day of February, 1993.

HOOVER REPORTING
Susan C. Hoover, RPR
Troy, Ohio
(513) 335-3008

* * *

[p. 3] Interstate 70
Dayton, Ohio

August 3, 1992
8:30:22 p.m.

Dispatch: (Inaudible.)

Officer Newsome: What do you do for a living?

Mr. Robinette: I work for International Paper.

Officer Newsome: Okay.

Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?

Mr. Robinette: I didn't see the sign was dropped down.

Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.

One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?

Nothing like that? Okay.

[p. 4] Is all the luggage in there both yours and his? All of it? Okay.

Would you mind if I search your car? Make sure there's nothing in there?

Wouldn't have any problem with it?

Why don't you step up here on the passenger side, right up here. Come on over here. Come out, please. Okay.

If you would both of you stand about ten feet in front of your car there and face the other way.

Dispatch: (Inaudible.)

Officer Newsome: Little bit further, if you would.

Dispatch: (Inaudible.)

Officer Newsome: Move up a little bit further, if you would.

That's fine. Right there. Thanks.

(Searching.)

Dispatch: (Inaudible.)

Dispatch: 308 (inaudible.)

Dispatch: (Inaudible.)

Officer Newsome: Is that all the marijuana you got?

Mr. Robinette: Console.

Officer Newsome: Okay.

Officer Newsome: Okay.

* * *

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Writ Of Certiorari
To The Ohio Supreme Court

REPLY BRIEF OF PETITIONER

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ARGUMENT

The Respondent makes several arguments in his brief that require a response.

The Respondent is on firm ground in arguing, as he does throughout a significant portion of his brief, that a police officer may not detain a person without the justification of an objectively reasonable belief that the person is, or is about to be, involved in criminal conduct. However, to make this argument is to miss the point. The issue in this case is whether a court should presume that a motorist has been illegally seized when, after the conclusion of the business of a traffic stop, a police officer asks the motorist additional questions, or whether the court should instead apply the totality of the circumstances test to determine if a reasonable person in the motorist's position would have believed that he was free to leave or to otherwise refuse to cooperate. The Respondent takes as established the issue that is to be resolved – was Robinette detained or coerced when he allowed the search of his car? The Petitioner's position is that the totality of the circumstances test is sufficiently flexible and sensitive to separate unlawful seizures from consensual encounters. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). Thus, the Petitioner's complaint is not with the unassailable principle that a police officer must not detain an individual without reasonable cause to believe that he is committing or about to commit a crime, but with the application of a bright-line test that decrees that detention or coercion occurs whenever an officer talks to a motorist after a traffic stop, unless the officer had informed the motorist that he is free to go.

The Respondent also argues that a proper application of the totality of the circumstances test would require this Court to find that he did not voluntarily choose to allow the search of the car, but merely acquiesced to the officer's suggestion. This argument asks this Court to revisit the factual findings of the trial court. In evident furtherance of this portion of his argument, Respondent suggests that this Court may undertake an independent examination of the "facts, findings and the record." (Respondent's Brief at 10.) In *Ornelas v. United States*, 1996 U.S. Lexis 3391, this Court held that, as a general matter, determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. However, this Court did not authorize reviewing courts to review findings of historical fact *de novo:*

> [A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officials.

The trial court found that the officer had made it clear that the traffic matter was over before he asked Respondent any further questions, that the officer was not overbearing in words or conduct and that the Respondent was educated and intelligent. Indeed, the videotape of the encounter and the Respondent's own testimony at the suppression hearing rebut the suggestion that the Respondent was so cowed by the officer or the events that he reasonably believed that compliance was required. The trial court's findings of historical fact are not subject to revision since they are not clearly erroneous.

Respondent also suggests that his cooperation was somehow tainted because the officer planned from the outset to ask for permission to look inside his car. The lawfulness of the stop did not depend on the officer's subjective motivation. *United States v. Whren*, 1996 U.S. Lexis 3720. And as long as the officer did nothing by words or deeds to convey the message that Respondent's cooperation was required, the fact that the officer intended from the start to ask for consent to search is irrelevant to the question of whether a reasonable person in the Respondent's position, under all of the circumstances, would have believed that he was free to go or to refuse to allow the search.

Finally, the Respondent argues that the Ohio Supreme Court's holding is based upon an adequate state ground. *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469. The Ohio Supreme Court unambiguously stated that the Fourth Amendment to the United States Constitution, as well as the Ohio Constitution, required the application of a bright-line test to separate consensual encounters from illegal detentions when an officer talks to a motorist at the conclusion of a traffic stop. In *Ohio v. Wyant*, 509 U.S. ___, 113 S. Ct. 2954 this Court granted a writ of certiorari, vacated judgement and remanded the case for further consideration in light of the decision on *Wisconsin v. Mitchell*, 509 U.S. ___, 113 S. Ct. 2194 when the holding of

the Ohio Supreme Court was presented in virtually identical language.

For these reasons Respondent's arguments fail.

Respectfully submitted,

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No. 95-891

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF OHIO, PETITIONER

v.

ROBERT D. ROBINETTE

ON WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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3288

QUESTION PRESENTED

Whether the Fourth Amendment categorically requires a police officer who has validly stopped a motorist for a traffic violation to inform the motorist that he is free to leave before any questioning of the motorist about matters unrelated to the original traffic stop may be found to be consensual.

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ON WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the Fourth Amendment categorically requires a police officer who has validly stopped a motorist for a traffic violation to inform the motorist that he is free to leave before any questioning of the motorist about matters unrelated to the original traffic stop may be found to be consensual. The Court's analysis and resolution of that question is likely to affect the admissibility of evidence in federal criminal prosecutions. Accordingly, the United States has an interest in the proper resolution of the question presented.

STATEMENT

1. On August 3, 1992, Deputy Sheriff Roger Newsome stopped respondent on Interstate Highway 70 in Montgomery County, Ohio, for driving 69 miles per hour through a construction zone that had a speed limit of 45 miles per hour. In order not to slow traffic unduly, Deputy Newsome's practice was to issue an oral warning, rather than a citation, to motorists speeding in the construction zone. Deputy Newsome also was a member of a highway drug interdiction program. As part of that program, he routinely asked permission to search the cars that he stopped for speeding violations. Pet. App. 2-3; Suppression Hearing Tr. 6-7, 14-17, 19.

When the deputy approached the stopped car, respondent was in the driver's seat and another individual was in the front passenger seat. Deputy Newsome asked respondent for his driver's license, and respondent gave it to the deputy. Deputy Newsome took the driver's license to his cruiser. After determining that respondent had no outstanding violations, the deputy returned to respondent's car. Deputy Newsome asked respondent to get out of the car and to step to the rear of the vehicle. Respondent did so. While respondent stood between his car and the deputy's cruiser, the deputy returned to his cruiser and turned on the cruiser's video camera. Pet. App. 2; Suppression Hearing Tr. 7-9, 12-14, 21-22.

When the video camera was activated, Deputy Newsome returned to respondent. He orally warned respondent about the speeding violation and handed the driver's license back to respondent. Deputy Newsome then asked: "One question before you get gone [*sic*]; are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Respondent answered "no." The deputy asked whether all the luggage in the car belonged to respondent and his passenger, and respondent replied that it did. Deputy Newsome then asked for permission to search the car. Respondent consented to the search. As a safety precaution, the deputy asked respondent and the passenger to stand in front of the car while he searched it. Pet. App. 2-3; Suppression Hearing Tr. 7-9, 15-17, 22-31.

Deputy Newsome found a small amount of marijuana in the car's console. Before continuing the search, the deputy placed respondent and the passenger in the back seat of his cruiser. When he resumed searching the car, Deputy Newsome found a methylene dioxy methamphetamine (MDMA) pill in a clear plastic film container. Deputy Newsome then placed respondent under arrest. Pet. App. 3; Suppression Hearing Tr. 10-11, 17-20. Based on his possession of the MDMA pill, respondent was indicted for drug abuse, in violation of Ohio Rev. Code Ann. § 2925.11(A) (Anderson 1993). Pet. App. 3.

2. Respondent filed a motion to suppress the evidence found during the search of his car. At the suppression hearing, respondent testified that he felt that he was free to leave after the deputy gave him the oral warning about the speeding violation and returned his driver's license to him. Suppression Hearing Tr. 23, 27.[1] He also testified that he was

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[1] On direct examination, respondent testified (Suppression Hearing Tr. 23):

> Q. And did [the deputy] indicate to you at that time that he was giving you a warning and that you were free to go?

"sort of shocked" when the deputy requested permission to search the car, "automatically" answered "yes," and felt that he could not refuse the deputy's request. Pet. App. 3; Suppression Hearing Tr. 24, 29. Respondent further testified that he had been stopped for speeding in the past and that he had a bachelor of science degree in botany. *Id.* at 30-31.

3. The trial court denied the motion to suppress. Pet. App. 24-26. The pertinent question, it stated, "is the validity of the consent given by [respondent]."

A. Yes, he did.

Q. And then at that time, I think, as the tape will reflect, the officer asked you some questions about did you have any weapons of any kind, drugs, anything like that. Do you recall that question?

A. Yes.

Q. What was running through your head at that time?

A. Uhm, surprised. I didn't know what—where he was coming from or what was going on or why he was asking me the question.

Q. Did you in fact feel you were free to leave at that point?

A. I thought I was.

Q. And did you attempt to leave at that point?

A. Uhm, I was beginning to. Yes.

On cross-examination, respondent similarly testified (*id.* at 27):

Q. I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?

A. Yes.

Id. at 25. In resolving that question, the court was "greatly aided by [the] video tape of the encounter." *Ibid.* Ordinarily, the court explained, the fact that respondent had been in custody during the traffic stop would be "of great significance" to the determination whether his ensuing consent was valid. *Ibid.* Based on the videotape, however, the court noted that, before asking about the presence of contraband and seeking consent to search, the officer had "made it clear to [respondent] that the traffic matter was concluded." *Ibid.* The court also rejected respondent's claim that his consent necessarily had been invalid because he had been unaware of his right to refuse the request for consent to search his car. Rather, the court found that "[t]he manner of inquiry, the phrasing of the request and the position of the parties eliminates the suggestion of overbearance by the officer." *Ibid.* The court held that those circumstances, "coupled with [respondent's] education and intelligence[,] cause this court to find that [respondent's] consent was valid and not the product of duress or coercion." *Id.* at 25-26. Respondent thereupon entered a no-contest plea and was found guilty. *Id.* at 17.

4. The district court of appeals reversed. Pet. App. 15-23. It held that "a reasonable person in [respondent's] position would not believe that the investigative stop had been concluded, and that he or she was free to go, so long as the police officer was continuing to ask investigative questions." *Id.* at 17-18. Moreover, the court held, "once a police officer has issued a traffic citation or warning for a speeding violation, it is unreasonable to detain the motorist further for the purpose of obtaining consent to search for drugs or alcohol, absent a reasonable and articulable suspicion that the motorist is transporting either drugs or

alcohol." *Id.* at 18. "Because the search * * * resulted from an unlawful detention," the court concluded, "the fact that [respondent], during the unlawful detention, may have consented to the search is immaterial." *Ibid.*

Judge Wolff dissented. Pet. App. 18-22. He argued that, at the time that respondent consented to the search, a reasonable person in respondent's position would have believed "that the investigative stop had been concluded, and that he or she was free to go." *Id.* at 20. He noted that respondent had a college degree and had testified that, after receiving his driver's license from the deputy, he had felt free to leave. *Id.* at 22. Judge Wolff thus agreed with the trial court that respondent was not "detained" when he consented to the search of the car. Whether a detention has come to an end, Judge Wolff stated, should be determined "on a case-by-case basis." *Ibid.*

5. The Ohio Supreme Court affirmed. Pet. App. 1-14. The four-justice majority held that the search of respondent's car "was invalid since it was the product of an unlawful seizure." *Id.* at 4. The court explained that, while the decision to stop respondent for speeding had been justified, once Deputy Newsome returned to respondent's car after checking his license, "every aspect of the speeding violation had been investigated and resolved." *Id.* at 6. And, the court held, "[w]hen the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure." *Ibid.* In

this case, the court held, the officer asked respondent to exit his car solely for the purpose of questioning him about matters unrelated to the speeding violation and regarding which there was neither probable cause nor reasonable suspicion to believe that a crime had been committed. *Id.* at 6-7. Thus, "the detention of [respondent] ceased being legal when Newsome asked him to leave his vehicle." *Id.* at 7. And, because respondent's consent to search "clearly was the result of his illegal detention, and was not the result of an act of will on his part," that consent was invalid. *Ibid.*

In so holding, the Ohio Supreme Court emphasized that it was adopting "a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation." Pet. App. 4; see *id.* at 8. The court explained (*id.* at 8-9):

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.
>
> * * * * *
>
> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citi-

> zens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Because "[a] 'consensual encounter' immediately following a detention is likely to be imbued with the authoritative aura of the detention," the court held, "citizens stopped for traffic offenses [must] be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation." *Id.* at 9. "Any attempt at consensual interrogation," the court stated, "must be preceded by the phrase 'At this time you legally are free to go' or by words of similar import." *Ibid.*[2]

Justice Sweeney, joined by two other justices, dissented. Pet. App. 10-14. He argued that the "unique" bright-line test adopted by the majority was "contrary to well-established state and federal constitutional law" and "vastly undercuts our law enforcement's ability to ferret out crime." *Id.* at 10. Justice Sweeney noted that "the crucial test" in determining whether a citizen's encounter with a police officer is consensual or is a Fourth Amendment seizure "has always been 'whether, taking into account all of the circumstances surrounding the encounter, the police conduct "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."'" *Id.* at 10-11

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[2] That principle is made clear in the syllabus of the Ohio Supreme Court's decision, see Pet. App. 1, which constitutes "the authoritative basis for its decision." *Reynoldsville Casket Co.* v. *Hyde*, 115 S. Ct. 1745, 1748 (1995); *Ohio* v. *Johnson*, 467 U.S. 493, 497 n.7 (1984); *Ohio* v. *Roberts*, 448 U.S. 56, 61 n.3 (1980).

(quoting *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991)). Contrary to the majority's bright-line rule, Justice Sweeney observed, "being informed of the right to refuse a search is but one factor to be taken into account when determining whether consent was freely given; it is not the '*sine qua non* of an effective consent.'" *Id.* at 12 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973)). And, he noted, there is no basis for departing from that approach in determining whether a person must be informed of the right to leave the scene of a detention. *Ibid.* Thus, "[w]hether the police officer uttered a warning is a relevant consideration, but it does not end the inquiry." *Ibid.*

Applying the totality-of-the-circumstances test, Justice Sweeney concluded that the encounter between respondent and the police officer became "an ordinary consensual encounter" after the officer had returned respondent's driver's license. Pet. App. 12. He argued that "[respondent's] consent should not be invalidated solely because it followed a traffic stop and simply because the police officer failed to warn [respondent] that he was free to go." *Ibid.* Rather, "[t]he utterance of these 'magic words' is but one factor for the fact-finder to consider when making the determination as to whether consent was voluntarily given." *Id.* at 12-13. Justice Sweeney noted that "[t]h[e] technique of requesting consent following an initial valid detention is employed on a daily basis throughout this nation to interdict the flow of drugs," and when the police inquiry is itself not coercive, a citizen's consent should not be invalidated. *Id.* at 14.

SUMMARY OF ARGUMENT

The fundamental requirement of the Fourth Amendment is that searches and seizures be reasonable. As this Court has long recognized, however, "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968)). Where an individual is not seized, an officer is generally free to ask questions of him, to ask to examine his identification, and to request consent to search his property, provided, of course, that in doing so the officer does not "convey a message that compliance with [his] requests is required." *Bostick*, 501 U.S. at 435; *id.* at 437; *Florida* v. *Royer*, 460 U.S. 491, 498 (1983) (opinion of White, J.) ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.").

Respondent was unquestionably "seized" within the meaning of the Fourth Amendment when Deputy Newsome stopped his automobile for speeding. The decisive question in this case is whether respondent was still seized as of the moment when Deputy Newsome, having issued respondent a warning for the traffic offense and returned his driver's license, requested and received respondent's consent to search the car. The Ohio Supreme Court held that respondent was still seized at that point. And, because the court held that Deputy Newsome lacked justification to extend the seizure to pose questions unrelated to the purpose of the traffic stop, it ruled that respondent's consent had been the product of an unlawful detention and hence violated the Fourth Amendment.

A. In holding that respondent was still seized at that point, the Ohio Supreme Court erred. The court based that holding on a new "bright-line test" (Pet. App. 4, 8) under which a seizure of a motorist invariably persists until an officer instructs the motorist that " '[a]t this time you legally are free to go' or [uses] words of similar import" (*id.* at 9). This Court, however, has consistently held that whether a person has been seized turns on "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437 (internal quotation marks omitted). The Court has accordingly rejected *per se* rules that determine, as a categorical matter, whether an individual has been seized.

An inquiry into the totality of the circumstances of an encounter is similarly appropriate to determine whether a seizure, once begun, has terminated. In holding that an encounter between an officer and a motorist following a traffic stop invariably constitutes a seizure until the motorist is told he is free to go, the Ohio Supreme Court relied on the fact that "[t]he transition between detention and a consensual exchange" (Pet. App. 8) may be difficult for a civilian to discern. The same, however, is true of the reverse situation in which an initially consensual encounter develops into a seizure. Yet this Court has never held that citizens are entitled to be notified before, or at the time when, such a Fourth Amendment event has commenced. Indeed, the requirement of mandatory police notification imposed by the Ohio Supreme

Court conflicts with this Court's consistent refusal to mandate prophylactic warnings to citizens in other areas of interaction with police.

Also unpersuasive as a basis for a "bright-line test" is the possibility that a consensual conversation that follows a detention will "be imbued with the authoritative aura of the detention." Pet. App. 9. In particular cases, that factor may prove significant in determining whether an individual continued to be seized at a particular point. The totality of the circumstances test, however, fully accommodates consideration of that factor, because, as this Court has emphasized, that test takes into account "not only * * * the particular police conduct at issue, but also * * * the setting in which the conduct occurs." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988). While an officer's statements to the motorist are relevant to the determination whether a reasonable person would feel free to terminate his encounter with the police, talismanic reliance on whether an officer has expressly advised a motorist that detention has ended ignores the fact that other circumstances may also convey to the motorist that he is free to do so. Those factors may include the fact that the officer has returned the driver's license and registration, the officer's manner and phrasing of inquiry, and the position of the parties.

B. As the trial court held after reviewing the videotape of the encounter in this case, those factors demonstrate that, at the time the officer asked respondent whether he would consent to a search of his car, a reasonable person would have understood that he was free to terminate the encounter. Among other things, Deputy Newsome had returned respondent's license, had completed the business of the traffic stop by

giving respondent a warning, did not demand that respondent answer his several questions, and did not engage in any show of authority. It was therefore lawful for Deputy Newsome to ask respondent for permission to search the car, and respondent's consent to that request was not the product of a Fourth Amendment seizure.

ARGUMENT

THE POINT AT WHICH A MOTORIST WHO HAS BEEN SUBJECT TO A TRAFFIC STOP WOULD FEEL FREE TO LEAVE TURNS ON ALL FACTS AND CIRCUMSTANCES SURROUNDING THE ENCOUNTER, NOT SOLELY ON WHETHER A POLICE OFFICER HAS ADVISED THE MOTORIST THAT HE IS FREE TO LEAVE

A traffic stop may lawfully be initiated based on an officer's reasonable belief that a motorist may be in violation of the traffic laws.[3] The Ohio Supreme

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[3] Such a traffic stop may be initiated upon a showing of reasonable suspicion, based on specific and articulable facts, to believe that an offense has been committed. See, *e.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985); *United States* v. *Hensley*, 469 U.S. 221, 226 (1985); *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981); *Delaware* v. *Prouse*, 440 U.S. 648, 653-654, 663 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880-884 (1975); see also *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989); *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980) (per curiam); *Terry* v. *Ohio*, 392 U.S. 1 (1968). Where an officer has observed a traffic violation, the higher standard of probable cause is met. See, *e.g.*, *New York* v. *Class*, 475 U.S. 106, 117-118 (1986) (stop of car for speeding and cracked windshield); *id.* at 125 (Brennan, J., concurring in part and dissenting in part); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam) (stop of car bearing expired license tags); *United States* v. *Robinson*, 414 U.S. 218, 220-221 (1973) (stop of car for driving

Court did not dispute that after completion of the stop (including questioning reasonably related to its justifications) a motorist may validly consent to additional police questioning, or to a search of his vehicle, provided that the encounter is consensual.[4] It held, however, that the Fourth Amendment imposes a bright-line rule that no such encounter may be deemed consensual unless the officer first informs the motorist, in specific terms, that he is free to leave. In our view, the court erred in adopting such a *per se* rule. Just as the question whether a seizure has begun is determined by examining the totality of the circumstances, so also is the question whether a seizure has ended.

A. The Totality Of The Circumstances Governs Determinations Of When A Fourth Amendment Seizure Has Begun And When The Seizure Has Ended

1. As the Court has explained, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment

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without a license); see also *Prouse*, 440 U.S. at 659; *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976).

[4] Petitioner has not presented the question whether it is reasonable briefly to extend a traffic stop whose business has otherwise been completed to ask a motorist, as did Deputy Newsome, whether he is carrying illegal drugs or firearms and whether he would consent to a search of the car. Nor does this case present the question whether it is reasonable to ask such questions during a traffic stop whose business is ongoing.

scrutiny unless it loses its consensual nature." *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991). Accordingly, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Ibid.* (quoting *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (opinion of White, J.)). See *United States* v. *Mendenhall*, 446 U.S. 544, 553 (1980) (opinion of Stewart, J.) (there is "nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets") (quoting *Terry* v. *Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring)).

This Court has addressed a number of situations requiring a determination whether—and, if so, when—a defendant has been seized during a discussion with law enforcement officers. The test that it has developed to distinguish seizures from consensual encounters is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (quoting *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.)). A seizure thus occurs at the point that a reasonable person would think that he was not free to terminate a conversation and go about his business. Circumstances that "might indicate a seizure * * * [include] the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

Mendenhall, 446 U.S. at 554 (opinion of Stewart, J.); see *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) (where DEA agents "grabbed [suspect] by the arm and moved him back onto the sidewalk," Court assumed that a seizure had occurred); *Terry*, 392 U.S. at 19 (where officer "took hold of [suspect] and patted down the outer surfaces of his clothing," seizure occurred). But, "[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of the person." *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.); see also *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam).

In applying the test of whether a reasonable person would feel free to leave, this Court has repeatedly emphasized the need to examine all of the facts and circumstances surrounding a citizen's interaction with police. See, *e.g.*, *Bostick*, 501 U.S. at 436-437; *Hodari D.*, 499 U.S. at 627-628; *Chesternut*, 486 U.S. at 573-574; *Rodriguez*, 469 U.S. at 5-6; *INS* v. *Delgado*, 466 U.S. 210, 215 (1984); *Royer*, 460 U.S. at 502 (opinion of White, J.); *id.* at 514 (Blackmun, J., dissenting); *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.). In so doing, the Court has rejected *per se* rules that would purport categorically to determine whether a citizen had been seized. In *Bostick*, for example, the Court rejected the claim that police questioning aboard a bus necessarily constitutes a seizure. The Florida Supreme Court had held that, because such questioning occurs in "cramped confines" where the presence of police is unusually intimidating, and because a passenger who wishes to avoid police is necessarily forced to divert from his travel schedule, questioning by drug-interdiction

police invariably constitutes a seizure requiring Fourth Amendment justification. 501 U.S. at 435.

This Court, however, held that the correct inquiry is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 436. That inquiry, the Court held, is made "taking into account all of the circumstances surrounding the encounter." *Id.* at 437 (quoting *Chesternut*, 486 U.S. at 569). And while "[w]here the encounter takes place is one factor, * * * it is not the only one." *Ibid*; see also *id.* at 439. Thus, the Court held (*id.* at 439-440):

> [I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.

Similarly, in *Chesternut*, the Court rejected a "bright-line rule" adopted by the Michigan Supreme Court that any "investigatory pursuit" of a motorist constitutes a Fourth Amendment seizure. 486 U.S. at 572. Instead, the Court held, "any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account 'all of the circumstances surrounding the incident' in each individual case." *Ibid.* (quoting *Delgado*, 466 U.S. at 215). See *Royer*, 460 U.S. at 506-507 (opinion of White, J.) (there is no "litmus-paper test for distinguishing a consensual encounter from a seizure," as

"there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers").

2. The Ohio Supreme Court adopted a bright-line test requiring that no questioning following a traffic stop may be found consensual unless the officer has expressly informed the motorist that he is free to leave. As the lower federal courts have consistently held, however, the determination of the point at which a seizure has concluded should instead be made in light of the totality of the circumstances of the encounter between the citizen and the police. The content and manner of any statements that an officer makes to or in the presence of the motorist have an important bearing upon whether a reasonable motorist would believe that he was free to leave.[5] Other factors, however, may also bear decisively on that issue. Those factors include whether the officer has returned the motorist's identification documents; whether the officer has completed the business of the traffic stop by issuing a summons or giving a warning to the motorist; whether the officer displays accoutrements of authority; and the officer's statements, tone, position, and manner towards the motorist.[6]

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[5] See, *e.g.*, *United States* v. *Sandoval*, 29 F.3d 537, 540-542 (10th Cir. 1994) (finding that seizure persisted where motorist asked, "That's it?," and officer responded, "No, wait a minute").

[6] See, *e.g.*, *United States* v. *Turner*, 928 F.2d 956, 959 (10th Cir.) (encounter between motorist and officer who had made traffic stop became consensual after officer returned license and registration and made no "coercive show of authority"), cert. denied, 502 U.S. 881 (1991); *United States* v. *Werking*, 915 F.2d 1404, 1408-1409 (10th Cir. 1990) (encounter between motorist and officer who had made traffic stop "became an ordinary consensual encounter" after officer returned driver's license and thereafter did not make an "overbearing show of authority"); *United States* v. *Rivera*, 906 F.2d 319, 322-323 (7th Cir. 1990) (traffic-stop seizure had concluded and become a consensual encounter once trooper wrote warning, returned identification documents, and told motorist "that was it"); see also *United States* v. *Lee*, 73 F.3d 1034, 1040 (10th Cir. 1996) (seizure held to continue where, as of point that officer requested consent to search car, officer still held onto license and registration papers); cf. *United States* v. *Rodriguez*, 69 F.3d 136, 141-142 (7th Cir. 1995) (in context of encounter with airport traveler, mere voluntary production of travel documents does not constitute a seizure, although "the lengthy retention of documents such as identification and airline tickets is a factor in determining whether a stop has occurred").

In holding that, regardless of the other circumstances of the encounter, an encounter between an officer and a motorist following a traffic stop invariably constitutes a seizure until an officer expressly advises the motorist that he is free to leave, the Ohio Supreme Court relied on two considerations. First, the court stated, absent express notification to the motorist that the seizure has concluded, "[t]he transition between detention and a consensual exchange can be so seamless that the untrained eye [of a motorist] may not notice that it has occurred." Pet. App. 8. The same, however, is true of the familiar reverse situation in which a police-citizen encounter that began consensually develops into a Fourth Amendment seizure. Yet this Court has never held that citizens are entitled to be notified by the officer whether, and when, such a Fourth Amendment event has commenced.

On the contrary, the Ohio Supreme Court's requirement that a motorist be admonished that he is

free to leave conflicts with this Court's consistent refusal to mandate prophylactic warnings to citizens in other areas of interaction with police. In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), for example, the Court held that whether an individual's "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. The Court thus rejected a proposed *per se* rule that the government establish that the individual knew that he has the right to refuse consent: "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Ibid.* The Court stated (*id.* at 231-232) that lower courts had rightly repudiated the approach of requiring a subject of a search to be advised of his right to refuse to give consent:

> [I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if

> he chooses, a defendant is informed of his trial rights. Cf. *Boykin* v. *Alabama*, 395 U.S. 238, 243 [(1969)]. And, while surely a closer question, these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda* v. *Arizona*, [384 U.S. 436 (1966)], we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.

Similarly, in *Delgado*, the Court rejected the notion that, before posing questions to a citizen, an officer should advise the citizen of his right not to respond. "While most citizens will respond to a police request," the Court noted, "the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." 466 U.S. at 216 (citing *Schneckloth*, *supra*). See *United States* v. *Watson*, 423 U.S. 411, 424 (1976) ("[T]he absence of proof that [the defendant] knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance."); *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.) (conclusion that police did not seize airport traveler "is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed") (citing *Schneckloth*, *supra*).

The Ohio Supreme Court also based its "bright-line rule" on the "likel[ihood]" that a consensual encounter that immediately follows a traffic stop will "be imbued with the authoritative aura of the detention." Pet. App. 9. The court explained that "[m]ost people believe that they are validly in a police officer's

custody as long as the officer continues to interrogate them." *Ibid.* That factor does not, however, justify a categorical requirement of formal notification of the right to leave. Rather, it commends giving weight, in the inquiry into whether a reasonable person would have believed at a particular point that he was free to leave, to the fact that an encounter had its roots in a nonconsensual stop. The traditional inquiry into "the coercive effect of police conduct, taken as a whole," *Chesternut*, 486 U.S. at 573, accommodates consideration of that factor, because, as this Court has explained, "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs," *ibid.* Thus, "the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings." *Id.* at 574. Where other factors would make clear to a reasonable motorist that he is free to leave, there is no reason to deem the encounter a continuing seizure solely because the officer has not expressly articulated that fact.

Finally, while the Ohio Supreme Court confined its "bright-line" requirement that there be an explicit notification that a seizure has concluded to the context of interrogations of motorists following traffic stops (Pet. App. 4, 9), the arguments it advanced do not logically limit themselves to that context. Instead, taken to its logical extreme, the court's approach would oblige officers to make similar declarations at the close of brief investigative detentions in the manifold contexts in which they daily occur—including streets, airports, bus and train stations, and public conveyances. See *Berkemer* v. *McCarty*, 468

U.S. 420, 439-440 (1984) (noting that the "comparatively nonthreatening character" of traffic stops relative to formal arrests makes such stops akin to *Terry* stops, and holding that the arrest-context requirement of *Miranda* warnings thus does not apply to roadside questioning of a motorist).[7] There is no justification for abandoning the long-standing totality-of-the-circumstances test to impose such a burdensome and mechanical requirement of formal notification upon law enforcement officers.[8]

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[7] The Court in *Berkemer* noted that "[t]wo features of an ordinary traffic stop mitigate the danger that a person questioned will be induced 'to speak where he would not otherwise do so freely'" (468 U.S. at 437 (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966))) and make roadside questioning analogous to a *Terry* stop (*id.* at 439). First, "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief." *Id.* at 437. Second, the "circumstances associated with the typical traffic stop," including its exposure to public view, "are not such that the motorist feels completely at the mercy of the police." *Id.* at 438.

[8] The Ohio Supreme Court also appeared to base its holding that respondent was seized on its perception that, in continuing to question respondent after the business of the traffic stop had been completed, Deputy Newsome acted out of a "motivation" unrelated to "the purpose of the original, constitutional stop." Pet. App. 6. To the extent that the court's analysis turned on the officer's subjective motivations, it was in error. As this Court has held repeatedly, the reasonableness of police conduct under the Fourth Amendment turns solely "on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985) (quoting *Scott* v. *United States*, 436 U.S. 128, 136 (1978)); *Horton* v. *California*, 496 U.S. 128, 138 (1990); see also *Bostick*, 501 U.S. at 439; *Chesternut*, 486 U.S. at 574. Compare *Whren* v. *United States*, No. 95-5841 (argued April 17, 1996) (presenting question whether motorist may challenge reasonableness of traffic stop based on probable

B. At The Time That Respondent Was Asked Whether He Would Consent To The Search Of His Car, A Reasonable Person Would Have Understood That He Was Free To Leave

Under the totality-of-the-circumstances test, it is clear, as the trial court held (Pet. App. 24-26) that, at the point that Deputy Newsome requested consent to search respondent's car, a reasonable person in respondent's situation would have understood that he was free to leave. By that point, Deputy Newsome had returned respondent's driver's license. He had also completed the business of the traffic stop, having orally warned respondent about the speeding violation while giving no indication that any further enforcement action would be taken. Compare cases cited at note 6, *supra*; *Royer*, 460 U.S. at 504 n.9 (opinion of White, J.) ("Royer's ticket and identification remained in the possession of the officers throughout the encounter; the officers also seized and had possession of his luggage. As a practical matter, Royer could not leave the airport without them."); *id.* at 504; *id.* at 508 (Powell, J., concurring).

Nothing about the questions that the deputy put to respondent after returning the license conveyed that respondent was obliged to answer. Indeed, the deputy indicated to respondent that even his questioning would shortly cease. See Pet. App. 2-3 ("One question before you get gone [*sic*]; are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"). Deputy Newsome also did not demand that respondent assent to a search of the car, but instead "requested permission" to do so.

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cause based on claim that officer acted out of "pretextual" motives).

Id. at 24. Finally, as the trial court found (*id.* at 25), the videotape of the episode belied any suggestion that respondent's consent was "the product of duress or coercion." Rather, "[t]he manner of inquiry, the phrasing of the request and the position of the parties eliminates the suggestion of overbearance by the officer." *Ibid.* Compare *Hodari D.*, 499 U.S. at 625 (no seizure where suspect was subject to neither application of physical force nor show of authority); *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.); see also *Bostick*, 501 U.S. at 434 (noting that Court has "held repeatedly that mere police questioning does not constitute a seizure"). Indeed, while the pertinent inquiry is whether a reasonable person, not the particular motorist, would have felt free to leave in light of all of the circumstances, respondent himself acknowledged that, after the deputy returned the driver's license, he felt that he was "free to leave." Suppression Hearing Tr. 23, 27.

Under those circumstances, a finding that a reasonable person would not have felt free to leave would necessarily be based solely on the fact that the deputy's questions and request for consent to search followed a traffic stop and were not preceded by an express statement that respondent was free to leave. See Pet. App. 12 (Sweeney, J., dissenting). As we have explained, the absence of such a statement—while germane to the issue whether a person, once seized, continues to be seized—does not alone establish an ongoing seizure. Nor does the fact that respondent consented to the search, despite his knowledge that his car possessed illegal drugs, suggest that his

consent was the product of coercive police conduct.[9] Accordingly, the conclusion of the Ohio Supreme Court that respondent remained seized at the time of the deputy's questions should be reversed.

CONCLUSION

The judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted.

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APRIL 1996

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[9] See *Bostick*, 501 U.S. at 437-438 (rejecting seizure argument based on claim that no reasonable person "would freely consent to a search of luggage that he or she knows contains drugs" and noting that "the 'reasonable person' test presupposes an *innocent* person"); *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.) ("We * * * reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions.").

(5)

No. 95-891

In The
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October Term, 1995

STATE OF OHIO,

Petitioner,

vs.

ROBERT D. ROBINETTE,

Respondent.

ON WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT.

MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF NEITHER PARTY.

(List of Counsel on Inside Front Cover)

14 pp

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MOTION OF AMICUS CURIAE TO FILE BRIEF AND BRIEF.

This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted

by Counsel for the Petitioner. Consent to file has not been received from Counsel for the Respondent, and *amicus* has been informed by Counsel's office that consent will not be granted. The letter of Petitioner has been filed with the Clerk of this Court, as required by the Rules.

Americans for Effective Law Enforcement, Inc., moves this Court for leave to file the attached brief as *amicus curiae*, and declares as follows:

1. *Identity and Interest of Amicus Curiae*. The *amicus curiae* is described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), is a national not-for-profit educational organization that conducts legal research and provides law bulletins and continuing legal education programs for law enforcement administrators and their counsel.

AELE has appeared before this Court as *amicus curiae* more than one hundred times and many times in other federal and state appellate courts. Its *amicus* program seeks to establish a body of law that enhances the effectiveness of law enforcement agencies, in a constitutional manner. AELE typically appears in support of a government agency or official. However, when the facts so warrant, AELE will decline to appear in a case or will support the opposition (as it did in *Hudson v. McMillian*, 112 S. Ct. 995 (1992)), or will choose to file its brief in support of neither party, as in the instant case.

2. *Desirability of an Amicus Curiae Brief. Amicus* is a professional association representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of administering policies and procedures involving the conduct of

traffic stops and consent searches of motorists and others; and (2) police legal advisors who are called upon to advise law enforcement officers and administrators in connection with such matters.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel at the state and national level—we are particularly aware of the impact of the ruling of the court below. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE is a national association, and its perspective is broad. This brief concentrates on policy issues, including the importance of effective rules and procedures for conducting traffic stops and consent searches in the field. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues as these.

4. *Avoidance of Duplication.* Counsel for *amicus curiae* has reviewed the facts of this case and has conferred with Counsel for Petitioner and has sought to confer with Counsel for the Respondent in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues directly related to law enforcement concerns that are not otherwise raised by either party.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of this Court. This motion is necessary because the Respondent has not granted consent to *amicus*.

For these reasons, the *amicus curiae* requests that it be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

See Section on Identity and Interest of *Amicus Curiae*, *supra.*

ARGUMENT

THE CONSTITUTIONAL VALIDITY OF A CONSENT SEARCH AFTER A VALID TRAFFIC STOP HAS BEEN CONCLUDED, SHOULD DEPEND UPON AN ANALYSIS OF THE TOTALITY OF THE CIRCUMSTANCES, RATHER THAN A PARTICULAR MECHANICAL VERBAL FORMULA USED BY THE POLICE.

The court below, *State v. Robinette*, 653 N.E.2d 695 (Ohio 1995), ruled that the right guaranteed by the federal and state (Ohio) constitutions, to be secure in one's person and property, requires that citizens stopped for traffic offenses be clearly informed by the detaining officer as to when they are free to go after a valid detention, before an officer attempts to engage in

a consensual interrogation looking to a consent search. In order to put the citizen on notice that the valid detention has ended and a period of consensual encounter has begun, the court said that an attempt at a consensual interrogation looking towards a consent to search must be preceded by the statement of the officer to the citizen, "At this time you legally are free to go," or by words to that effect.

By its own assertion, the court adopted this so-called "bright-line" rule in order to protect the voluntariness of any statement made by the citizen in this part of what it called a "seamless" transition from the end of the detention stage (reasonable suspicion) to the stage of a consensual encounter (lack of reasonable suspicion). Additionally, and as actually at issue by the facts of this case, the mechanical formula would assertedly protect the voluntariness of a consent to search that might take place in the consensual phase of the overall encounter. Because the officer in this case did not mark the point of ending of the first phase and the point of beginning of the second phase with this ritualistic warning, or words to the same effect, the defendant's consent was considered by the court to be involuntary.

The state of Ohio appears to be unique among the state and federal jurisdictions in constructing this new "bright-line" litmus test of voluntariness for consent searches, as pointed out by the dissenting opinion of Justice Sweeney. Such a rule was recently declined by the Sixth Circuit Court of Appeals in *United States v. Erwin*, 71 F.3d 218 (6th Cir. 1995). More importantly, no support in established principles of constitutional law articulated by the United States Supreme Court can be found for such a mechanical formulation, which can only be described as a prophylactic rule similar to that adopted by the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), to protect the Fifth Amendment privilege against self-incrimination.

Americans for Effective Law Enforcement has always taken

the position—going back to our *amicus curiae* brief filed in *Terry v. Ohio*, 392 U.S. 1 (1968)—that a detention for investigative purposes must be supported by the constitutional minimum of reasonable suspicion. We said in our *amicus* brief in *Terry*, pp. 8-9, in referring to police detention practices or techniques not based upon particularized suspicion,

> All of those techniques, stated abstractly, may be, and probably are, violative of the Fourth Amendment. We would not ask this Court to approve them, efficacious as they may be as crime prevention measures. The point we make is that they can be distinguished, and must be distinguished, from the practice of stopping *particular* persons, found in *particular* circumstances which indicate past, occurring, or potential criminal conduct, for the purpose of questioning—in some cases, followed, or even preceded, by the protective device of frisk or search for weapons.

We have likewise condemned in an *amicus* brief filed in *Florida v. Bostick*, 501 U.S. 429 (1991), oppressive techniques of dragnet-style searches not based upon reasonable suspicion or probable cause (detaining all passengers on a bus without reasonable suspicion and requiring their "consent" to a search of their luggage). We said in *Bostick* that such tactics are abhorrent and comply with neither constitutional requirements nor accepted police norms of professional conduct.

Amicus supports the position of this Court in *United States v. Mendenhall*, 446 U.S. 544 (1980), as to what constitutes a Fourth Amendment seizure (restraint of liberty such that a reasonable person would not feel free to walk away: *Mendenhall*, 446 U.S. at 553-554). We likewise support the position of this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), as to what constitutes a valid consent to search (the totality of the circumstances with reference to a large list of relevant factors, including elements of police pressure and even

whether the subject has been warned of his right to refuse consent: *Schneckloth*, 412 U.S. at 227). In the subsequent case of *Florida v. Jimeno*, 500 U.S. 248 (1991), this Court applied the *Schneckloth* test to a consent search following a traffic stop, as in the instant case. And we also agree wholeheartedly with the Court's ruling in *Delaware v. Prouse*, 440 U.S. 648 (1979), that officers may not conduct traffic stops and detentions of individual motorists without articulable, reasonable suspicion.

What is particularly noteworthy to *amicus* is that in establishing the test for voluntariness of consent searches in *Schneckloth*, this Court had an opportunity to adopt a prophylactic rule similar to that in *Miranda* requiring that the police must first warn a subject of his right to refuse consent. The Court, however, did not do so. It wisely took the position that although such a warning would be *relevant* to a finding of voluntariness under the totality of the circumstances, it was not constitutionally *required*.

Such a warning may be good police practice, and indeed *amicus* knows that many law enforcement agencies among our constituents have routinely incorporated a warning into their Fourth Amendment consent forms that they use in the field, but it is precisely that—a *practice* and *not a constitutional imperative*. An officer who includes such a warning in his request for consent undoubtedly presents a stronger case for a finding of voluntariness in a suppression hearing, and we would not suggest that such agencies and officers do otherwise. We know, too, that instructors in many police training programs of leading universities and management institutes routinely recommend such warnings as a sound practice, likely to bolster the voluntariness of a consent to search. AELE itself conducts law enforcement training programs at the national level and many of our own speakers have made this very point.

This is not, however, what the court below has done. It has elevated a police practice to the position of a federal and state

constitutional right. It opens the door to a new era of endless litigation at the suppression hearing, trial court, appellate court and state and federal collateral review court levels, over the existence, adequacy, meaning, effectiveness and sufficiency of a ritualistic warning requirement that in light of *Schneckloth* and *Jimeno* can only be considered a prophylactic rule, not a constitutional imperative. We respectfully urge this Court not to launch a new *Miranda*-like era of fruitless litigation in Fourth Amendment jurisprudence similar to that which presently exists in the jurisprudence of police interrogation of suspects.

Amicus takes no position on the facts of the case before this Court. It reasserts its long-standing position against non-normative, oppressive police practices dealt with in *Terry v. Ohio* (detentions for investigation not based upon reasonable suspicion) and *Florida v. Bostick* (dragnet-like detentions and searches not based upon reasonable suspicion or probable cause). We believe that the voluntariness test for consent searches articulated by this Court in *Schneckloth v. Bustamonte*, and reaffirmed in traffic stop cases by *Florida v. Jimeno*, is constitutionally sound and thoroughly workable from a practical standpoint. Trial and appellate courts have for over twenty years been able to effectively apply the test devised by this Court in *Schneckloth* for determining the voluntariness of consent searches.

While we would encourage the police to consider the adoption of a warning of Fourth Amendment rights in the consent search context (without endorsing the mechanical formulation used by the court below) as a matter of practice, we respectfully request this Court to treat this as what it is—a *practice*—and *not a constitutional imperative*. As this Court wisely noted in the majority opinion of Justice O'Connor in *Davis v. United States*, 114 S. Ct. 2350 (1994), there is a *critical difference* between a sound *police practice* and a *constitutional imperative*. The Court took the position in that case that police clarification of suspects' ambiguous references

to counsel after an effective *Miranda* waiver might be a good police practice, but was not constitutionally required. *Amicus* respectfully submits that the same is true with respect to the police practice of warning of Fourth Amendment rights in the context of a consent to search.

CONCLUSION

Amicus urges this Court to reverse the decision of the court below insofar as it requires a formalistic warning, on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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(9)

No. 95-891

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Petition For Writ of Certiorari
To The Ohio Supreme Court

BRIEF OF AMICUS CURIAE STATES OF ALABAMA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WISCONSIN, WYOMING, AND THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA, AND VIRGINIA, IN SUPPORT OF PETITIONERS STATE OF OHIO

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QUESTION PRESENTED - AMICUS FORMULATION

AFTER CONCLUDING A TRAFFIC STOP, ARE POLICE OFFICERS REQUIRED UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO GIVE A PROPHYLACTIC, *MIRANDA*-LIKE WARNING (E.G., "AT THIS TIME YOU ARE LEGALLY FREE TO GO") BEFORE ASKING ANY ADDITIONAL QUESTIONS OF THE DRIVER OR BEFORE SEEKING THE DRIVER'S CONSENT TO SEARCH THE VEHICLE?

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STATEMENT OF AMICUS INTEREST

In the decision below, the Ohio Supreme Court created a new doctrine of federal constitutional law, one that contradicts several precedents from this Court and one that will place additional obstacles in the path of legitimate law enforcement efforts. The court held that after a traffic stop has ended, the police officer must warn the driver "At this time you are legally free to go" (or words to that effect) before asking the driver additional questions or requesting consent to search the vehicle. *State v. Robinette*, 73 Ohio St.3d 650, 655 (1995). Thus, under the decision, even though a driver admits that he understood he was "free to leave" when the consensual encounter began (as happened here), even though he then voluntarily consents to a search (as happened here) and even though the police later find contraband in the car (as happened here), the evidence must be suppressed and the defendant allowed to go free.

Until now, that simply was not the law. As this Court has repeatedly held, "a person has been 'seized' within the meaning of the Fourth Amendment, *only if*, in view of all of the facts and circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (emphasis added). *See also Florida v. Bostick*, 501 U.S. 429 (1991). In disregarding this well-established doctrine, the Ohio Supreme Court has not just made new law but has also endangered legitimate law enforcement techniques. Consensual encounters between police and citizens arise in a wide variety of contexts -- not just in traffic stops, but also at airports, on buses, in immigration factory sweeps, as well as on the streets -- and represent an important crime-prevention weapon in the arsenal of law enforcement officers. Accordingly, the Amici States are broadly concerned about the impact of this decision -- and its

new analytical framework -- on this and other areas of law enforcement.

Consensual encounters also arise frequently in the context of drug interdiction efforts. For this reason, as Justice Powell once observed, it is particularly important that courts not unnecessarily curb time-honored approaches to this difficult area of law enforcement:

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

United States v. Mendenhall, 446 U.S. 544, 561-62 (Powell J., joined by Burger C.J. and Blackmun J., concurring in part and concurring in the judgment).

In the end, by requiring police officers to advise lawfully-stopped individuals "At this time you are legally free to go" before engaging in a consensual encounter, the Ohio Supreme Court has illegitimately impaired police reliance on consensual encounters as a proper tool of law enforcement and in the process hampered efforts to curb illegal drug trafficking and use. For these reasons and those

elaborated below, the Amici States join together in asking this Court to reverse.

ADDITIONAL STATEMENT OF THE FACTS

The trial court determined that Robinette knew that the traffic stop had been concluded and that he was free to leave at the time he gave consent to search his car. Appendix to the Petition, pp. 24-25. This determination was supported by several pieces of evidence, but most credibly by a videotape of the encounter and by the admissions of Robinette himself.

In pertinent part, the conversation captured by the videotape went as follows:

Interstate 70
Dayton, Ohio

August 3, 1992
8:30:22 p.m.

Dispatch: (Inaudible)

Officer Newsome: What do you for a living?

Mr. Robinette: I work for International Paper.

Officer Newsome: Okay.

Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?

Mr. Robinette: I didn't see the sign was dropped down.

Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.

Mr. Robinette: Yea, (Inaudible)

Officer Newsome: One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?

Mr. Robinette: Shaking head no.

Officer Newsome: Nothing like that? Okay.

Mr. Robinette: Shaking head no.

Officer Newsome: Is all the luggage in there both yours and his? All of it? Okay.

Mr. Robinette: Shaking head yes.

Officer Newsome: Would you mind if I search your car? Make sure there's nothing in there?

Mr. Robinette: No, go ahead.

Officer Newsome: Wouldn't have any problem with it?

Mr. Robinette: No.

Officer Newsome: Why don't you step up here on the passenger side, right up here. Come on over here. Come out, please. Okay.

If you would both of you stand about ten feet in front of your car there and face the other way.

Dispatch: (Inaudible.)

Officer Newsome: Little bit further, if you would.

Dispatch: (Inaudible.)

Officer Newsome: Move up a little bit further, if you would.

That's fine. Right here. Thanks.

(Searching.)

On cross-examination at the motion to suppress hearing, Robinette also testified as follows:

Q. I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?

A. Yes.

Q. And you indicated that then he asked you whether or not you had contraband in that vehicle; is that correct?

A. Yes.

Q. And you -- and you obviously knew that you could answer that either yes or no; isn't that true?

A. Yes.

See Appendix *(State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Tr. page 27). The trial court further found that Robinette voluntarily consented to the search of his car. *See* Appendix to the Petition, pp. 24-25. In spite of this evidence and these findings, the Ohio Supreme Court determined that no reasonable person would feel free to leave after a traffic stop had ended and that no reasonable person could voluntarily consent to a search in that context.

SUMMARY OF ARGUMENT

The question whether an encounter between a police officer and a citizen is "consensual" (and therefore beyond the scope of the Fourth Amendment) or a "seizure" (and therefore protected by the Fourth Amendment) is not a new one. This Court has long held that the test is one of context, focused on the facts and circumstances of each encounter. Thus, "a person has been 'seized' within the meaning of the Fourth Amendment, *only if*, in view of all of the facts and circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (emphasis added). *See also Florida v. Bostick*, 501 U.S. 429 (1991); *California v. Hodari D.*, 499 U.S. 621 (1991); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Florida v. Rodriquez*, 469

U.S. 1 (1984); *INS v. Delgado*, 466 U.S. 210 (1984); *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion).

The Ohio Supreme Court failed to follow this test in at least two important respects. First, it erected a *per se* barrier to permitting an initial seizure to become a consensual encounter. By requiring the officer first to alert the driver "At this time you are legally free to go," the court created an inflexible test that focuses on just one "fact" in the incident -- the presence of a warning -- disregarding the Court's time-honored approach to this issue which accounts for "all of the facts and circumstances surrounding the incident." *See United States v. Mendenhall*, 446 U.S. at 555. That simply is inconsistent with this Court's Fourth Amendment precedents, particularly those cases that have specifically rejected similar efforts to create a *per se* test for determining whether a seizure has occurred. *See e.g., Florida v. Bostick*, 501 U.S. 429 (1991); *Michigan v. Chesternut*, 486 U.S. 567 (1988).

Second, and no less importantly, the court concluded that "a reasonable person would not feel free to walk away" in the absence of such a warning because it is "unknown to most citizens that the officer lacks legal license to continue to detain them." 73 Ohio St.3d at 655. But just as this Court has properly rejected efforts to impose *per se* tests for determining whether a consensual encounter has occurred, so too has it made clear that individuals do not need *Miranda*-like warnings before having the capacity to consent to the search of a vehicle under the Fourth Amendment. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *INS v. Delgado*, 466 U.S. 210 (1984). This, too, constitutes reversible error.

Nor is there any basis in reason, precedent or the text of the Fourth Amendment itself why the "facts and

circumstances" test is inadequate for situations like this one -- where the seizure devolves into a consensual encounter. By its very nature a "facts and circumstances" test is designed to handle a whole range of law enforcement settings. It thus is no less equipped to ascertain whether a consensual encounter has matured into a seizure, *see, e.g., Florida v. Royer*, *supra*, than it is to determine whether an initial seizure has become a consensual encounter. The test for one is appropriately the test for the other.

Besides being inaccurate, the lower court's new prophylactic rule also will exact a high cost. Above all, it will jeopardize a critical tool of state law enforcement. Consensual encounters have long been an important method of investigation, and curbing police officers' ability to use this approach will unnecessarily hamstring efforts to ferret out illegal drug trafficking and use. This case is a perfect example. At the time consent was given, the officer had told Robinette he would not be charged for speeding, the officer had returned Robinette's license to him, and Robinette himself admitted that he felt free to leave. Nonetheless, the Ohio Supreme Court concluded that no reasonable person would feel free to leave under these circumstances unless they had first heard the magic coda: "At this time you are legally free to go." Such a one-size-fits-all interpretation of the Fourth Amendment disregards precedent and unnecessarily hinders proper law enforcement efforts. The Court should reverse and reaffirm its prior decisions in the face of a decision that wholly ignores them.

ARGUMENT

I. CONSENSUAL ENCOUNTERS DO NOT VIOLATE -- INDEED DO NOT EVEN IMPLICATE -- THE FOURTH AMENDMENT.

The interpretation of the Fourth and Fourteenth Amendments to the United States Constitution, adopted by the court below, is premised on policy determinations about what type of law enforcement techniques are proper and about what type of law enforcement techniques are necessary. However prudent these views may be, they simply are not consistent with this Court's precedents concerning consensual encounters.

"The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." *Florida v. Bostick*, 501 U.S. 429, 439 (1991). For this important reason, an encounter between the police and a citizen "will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Id.* at 434. *See also Florida v. Rodriquez*, 469 U.S. 1, 5-6 (1984) ("consensual encounter[s] . . . implicat[e] no Fourth Amendment interest"); *INS v. Delgado*, 466 U.S. at 215 ("What is apparent from *Royer* and *Brown* is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation"); *Florida v. Royer,* 460 U.S. 491, 497 (1983) ("law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions"); *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968) ("Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of

physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

An encounter with police becomes a "seizure" and implicates the Fourth Amendment "*only if*, in view of all of the facts and circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (Opinion of Stewart, J.) (emphasis added). So long as "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," Fourth Amendment scrutiny simply is not required or even implicated. *Bostick*, 501 U.S. at 435-37. *See also Royer*, 460 U.S. at 501-02. The standard, moreover, has been followed without hesitation in a wide variety of settings. *See, e.g., Bostick* (bus passengers); *Chesternut*, 486 U.S. 567 (1988) (investigatory pursuit); *INS v. Delgado*, 466 U.S. 210 (1984) (factory sweeps); *California v. Hodari D*, 499 U.S. 621 (1991) (police chase).

In this instance, there can be little doubt that the prosecution met this test. Relying on the fact that the officer had informed Robinette that he would not be charged, the fact that the officer had returned Robinette's license to him and the fact that Robinette himself felt free to leave, the trial court properly found that a reasonable person would have felt free to leave at the time consent to search was given. *See* Appendix to the Petition, pp. 24-25. Under established and long-followed case law, this conclusion ends the matter: There was no "seizure" when consent was given, and no Fourth Amendment justification for further scrutinizing the encounter.

II. THE COURT HAS SPECIFICALLY REJECTED *PER SE* TESTS FOR ASSESSING THE PROPRIETY OF A POLICE ENCOUNTER.

The first mistake that the Ohio Supreme Court made in failing to reach this conclusion was to establish a new *per se* barrier for assessing whether a police encounter rises to the level of a "seizure." "We also use this case," the court stated unambiguously,

> to establish a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation.

Robinette, 73 Ohio St.3d at 652. Whatever the merits of a *per se* test may be as a matter of policy, this Court has specifically rejected such tests in determining whether a "seizure" has occurred under the Fourth Amendment.

In *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988), for example, the Court rejected just such an attempt in the context of investigatory pursuits:

> Both petitioner and respondent, it seems to us, in their attempts to fashion a bright-line rule applicable to all investigatory pursuits, have failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account "'all of the circumstances surrounding the incident'" in each individual case. *INS v. Delgado*, 466 U.S. 210, 215 (1984), quoting *United States*

> *v. Mendenhall*, 446 U.S. 544, 554 (1980) (Opinion of Stewart, J.). Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach and determine only that, in this particular case, the police conduct did not amount to a seizure.

Similarly, in *Florida v. Bostick*, 501 U.S. 429 (1991), the Court refused to hold that all requests by police officers for consent to search the luggage of bus passengers are improper. In doing so, the Court reversed a decision of the Florida Supreme Court that, like this one here, attempted to erect a *per se* rule in this area. The Court remanded the case to state court for a decision on the factual question that this Court has long used to distinguish "consensual encounters" from "seizures" -- whether a reasonable person would "free to leave" at the time of the encounter. *Id.* at 437.

Finally, in an analogous setting, the Court has held that individuals subjected to a traffic stop are not necessarily in custody for Fifth Amendment purposes. *Berkemer v. McCarty*, 468 U.S. 420 (1984). In reaching this conclusion, the Court rejected efforts by the prosecution and defense to erect a *per se* rule, noting the unacceptable consequences of either extreme:

> Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that *Miranda* applies to all traffic stops or a rule that a suspect need not be advised of his rights

> until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws -- by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists -- while doing little to protect citizens' Fifth Amendment rights. The second would enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.

Berkemer v. McCarty, 468 U.S. at 441.

The lower court's *per se* rule not only disregards this Court's precedents but also does so at the expense of a traditional and much-needed law enforcement technique. By contrast, the contextual "facts and circumstances" test diminishes the risk that permissible encounters between police and citizen will be too quickly condemned as unconstitutional, in the end prohibiting the use of probative, necessary and legitimate evidence. This case is a perfect example. Even though respondent took the stand and admitted under oath that he felt "free to leave" when the officer asked for consent to search his car, the fruits of that search were suppressed. As Justice Stewart once noted, "characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *Mendenhall*, 446 U.S. at 555. The

lower court's decision confirms this pitfall; it should be reversed.

III. THIS COURT HAS SPECIFICALLY REJECTED THE NEED FOR PROPHYLACTIC WARNINGS BEFORE THE POLICE MAY ENGAGE IN A CONSENSUAL ENCOUNTER.

The second mistake that the Ohio Supreme Court made was in requiring police to give prophylactic warnings before a lawful stop may devolve into a consensual encounter. *See* 73 Ohio St.3d at 655 ("That the officer lacks legal license to continue to detain them is unknown to most citizens and a reasonable person would not feel free to walk away as the officer continues to address them."). Just as this Court has rejected *per se* barriers to the conclusion that a consensual encounter has occurred, it also has held that individuals do not need *Miranda*-like advice before having the capacity to consent to the search of a vehicle.

Twenty-three years ago, in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court held that knowledge of the right to refuse consent is not the "*sine qua non*" of a voluntariness inquiry under the Fourth Amendment. *Id.* at 234. It thus specifically rejected the "relinquishment of a known right" standard that the Ohio Supreme Court adopted below. *Id.* at 231-34. Later cases confirm the vitality of this standard. *Delgado* held: "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." 466 U.S. at 217. And *Mendenhall* held: "Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for

the voluntariness of her responses does not depend on her having been so informed." 446 U.S. at 555. *See also United States v. Kim*, 27 F.3d 947 (3rd Cir. 1994) ("courts have clearly rejected the 'attempt to *Mirandize* [F]ourth [A]mendment consents'") (citation omitted).

Against this backdrop, the Ohio Supreme Court's contrary conclusion amounts to reversible error. Under the Fourth Amendment, individuals simply do not need to be fully apprised of their legal rights before having the capacity to consent to the search of their car.

IV. THE TRADITIONAL "FACTS AND CIRCUMSTANCES" TEST PROPERLY ACCOUNTS FOR CONSENSUAL ENCOUNTERS THAT MATURE INTO SEIZURES AS WELL AS SEIZURES THAT DEVOLVE INTO CONSENSUAL ENCOUNTERS.

Nor is there any tenable reason why a "facts and circumstances" test is inappropriate for situations like this one -- where a seizure devolves into a consensual encounter -- as opposed to the situation where a consensual encounter matures into a seizure. The whole point of a contextual approach is that it is sufficiently flexible to account for all situations, not just one, not even just some.

As the Court has long recognized, this test has the benefit of accounting for a wide variety of factual situations and of permitting courts to treat those situations differently. On the one hand, there may well be cases where an officer's failure to advise people that they are free to leave the scene may be significant in determining whether a consensual encounter has occurred. But, at the same time, there may be situations where that simply is not the case. The standard

followed by this Court, unlike the one-size-fits-all approach used below, accounts for both situations and permits courts properly to treat different fact patterns differently. The test thus accounts for a wide range of settings including any alleged differences between consensual encounters that become seizures and seizures that become consensual encounters. Nor have the lower courts had any trouble applying this standard in the context of cases like this one -- where the consensual encounter followed a seizure. *See, e.g., United States v. Werking*, 915 F.2d 1404 (10th Cir. 1990); *United States v. Dunson*, 940 F.2d 989 (6th Cir. 1991); *United States v. Tragash*, 691 F. Supp. 1066 (S.D. Ohio, 1988); *State v. C.S.*, 632 So.2d 675 (Fla. App. 1994). The lower court's contrary conclusion should be reversed.

V. THE DECISION BELOW, IF ADOPTED BY THIS COURT, WILL SUBSTANTIALLY IMPEDE DRUG INTERDICTION EFFORTS IN THE STATES.

The Amici States fear that the decision of the court below will have severe consequences for local drug interdiction efforts. Use of consensual encounters in drug interdiction has occurred in numerous contexts -- road-side stops, buses, airports -- and has long been an effective law enforcement tool. *See Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. Crim. L. 1109 (1992). In 1994 and 1995 alone, for example, Ohio police officers initiated 408 criminal narcotics prosecutions based on evidence discovered through consents to search. Between 1992 and 1995, in 20 cases in which consents were obtained in "car" cases, Ohio Highway Patrol officers confiscated drugs and currency worth $5,347,988. *See Appendix (*Report of S. Lt. W.D. Healy, December 11, 1995). Similarly, in Texas, 779 traffic stops in 1995 netted 35,803 pounds of

marijuana, 120,771 grams of cocaine, and over 3 million dollars in currency, with a substantial number of such searches based on the driver's consent. *See* Affidavit of John C. West, Jr., Texas Department of Public Safety. Left as is, the unyielding formula adopted by the court below will unnecessarily interfere with, if not dramatically impede, successful law enforcement efforts like these in the future.

CONCLUSION

Amici States respectfully request the Court to reverse the decision below.

Respectfully submitted,

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COUNSEL FOR AMICI STATES

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	
	:	CASE NO. 92-CR-2800
Plaintiff,	:	
	:	
v.	:	
	:	
ROBERT D. ROBINETTE,	:	
	:	
Defendant.	:	

BY MS. SORRELL:

Q. I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?
A Yes.
Q And you indicated that then he asked you whether or not you had contraband in the vehicle; is that correct?
A Yes.
Q And you -- and you obviously knew that you could answer that either yes or no; isn't that true?
A Yes.
Q And although you could have automatically said yes, that being the truth, you, in fact, said automatically no; isn't that correct?

Mr. Ruppert: Objection.
The Court: Well -
Mr. Ruppert: that again goes to the merits of the issue. There are actually three answers; yes, no, and I don't know. Actually, four; I don't have to answer that.
The Court: Except that apparently this has to do with something that may be contained on the stipulated exhibit.

INTER-OFFICE COMMUNICATION

Date December 11, 1995 File No. 3CAS

Level General
To Major R.N. Rucker Attention _____

From S.Lt. W.D. Healy, TDIT Unit Coordinator

Subject-Consent to Search Cases involving Divisional Officers

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On December 6, 1995, Carol O'Brien from the Ohio Attorney General's Office contacted me reference their need to have some statistical information from the Division concerning consent to search cases. The Ohio Attorney General's Office is filing an amicus brief with the United State Supreme court in support of an appeal filed by the Montgomery County Prosecutor (Mathias Heck) on the recently decided Ohio Supreme Court case entitled *State v. Robinette*. The Robinette case dealt with the Ohio Supreme Court's decision requiring law enforcement officers to inform a violator that they are "legally free to leave" prior to requesting a consent to search. The Ohio Attorney General's office would like the Ohio Supreme Court's decision to be reviewed and reversed by the United States Supreme Court; should they decide to grant certiorari and agree to hear the case.

Attached is a synopsis of twenty (20) significant drug or currency seizure cases over

the past 3 years involving TDIT personnel utilizing consent to search authority.

In addition, officers from throughout the state have initiated 408 criminal narcotics cases over the past two (2) years (1994 and 1995) in which consent to search was utilized to locate the narcotics. This information was obtained from the divisional Case Management Systems (CMS) maintained by the Office of Investigative Services.

This information was faxed to the Ohio Attorney General's Office for their use in assisting in the development of the amicus brief for the United States Supreme Court.

TRAFFIC AND DRUG INTERDICTION TEAMS (TDIT)

CONSENT TO SEARCH CASE INVESTIGATIONS

COCAINE SEIZURES:

DATE INCIDENT	AMOUNT	DESCRIPTION OF
8-21-94	19 pounds	Numerous drug courier indicators observed; consent to search was granted which revealed several screw heads around heater core to be extremely clean while the rest were dirty; housing around the heater core removed which revealed 19 pounds of cocaine.
10-18-92	5 pounds	Consent to search requested which revealed 5 pounds of cocaine under the rear seat.

MARIJUANA SEIZURES

DATE INCIDENT	AMOUNT	DESCRIPTION OF
1-27-93	622 pounds	Ryder rental truck; consent to search granted which revealed 622 pounds of marijuana in 16 U-haul

		cardboard boxes mixed in with used furniture.
4-24-95	267 pounds	Consent to search was granted which revealed 267 pounds of marijuana in a modified false compartment underneath the floor of the vehicle; compartment was made out of steel and ran the entire length of the Chevrolet Suburban passenger area.
6-19-93	158 pounds	Consent to search granted which revealed 158 pounds of marijuana in 4 large garbage bags in the trunk.
2-28-95	143 pounds	Consent to search granted which revealed the front door windows would not roll down; door panels were removed which revealed marijuana; a total of 143 pounds was found in various natural cavities of the vehicle.
7-31-94	110 pounds	Consent to search granted which revealed 110 pounds of marijuana inside luggage secured to the top of the vehicle and tied down with ropes and covered with a tarp.

1-10-94	101 pounds	Consent to search granted which revealed 101 pounds of marijuana in the trunk.
12-1-93	50 pounds	Consent to search was granted which revealed two (2) electronically controlled compartments in the rear seat arm rest panels which revealed 50 pounds of marijuana.
6-19-93	44 pounds	Consent to search was granted which revealed a hidden compartment in the vehicle's gas tank containing 44 pounds of marijuana.
6-8-93	40 pounds	Consent to search was granted which revealed 40 pounds of marijuana in 2 large suitcases and 1 duffel bag in the trunk.
3-16-94	33 pounds	Consent to search was granted which revealed 33 pounds of marijuana found in the natural cavities of the vehicle's quarter panel area.
3-30-95	10 pounds	Consent to search was granted which revealed 10 pounds of marijuana under the rear seat.

CURRENCY SEIZURES

DATE INCIDENT	AMOUNT	DESCRIPTION OF
4-13-94	$439,844.00	Consent to search granted which revealed a false door under the passenger compartment of the vehicle; a trap door was located under the rear seat and the compartment had $439,844.00 cash inside.
2-24-94	$67,400.00	Consent to search granted which revealed $67,400.00 cash in 13 separate envelopes and a loaded 9MM handgun in the passenger compartment.
7-7-95	$37,000.00	Consent to search granted which revealed 3 electronic compartments in the back seat area; 2 of the compartments were empty; the other compartment was found in the right rear seat arm rest panel area and contained $37,000 cash.
2-3-93	$35,500.00	Consent to search granted which revealed $35,500.00 cash in the right rear door panel.

7-31-92	$30,600.00	Consent to search granted which revealed $30,600.00 cash in a shoe box on the back seat.
7-29-94	$30,399.00	Consent to search granted which revealed $30,399.00 cash in the back end of a Ryder rental truck mixed in with furniture and clothing.
3-10-93	$29,980.00	Consent to search granted which revealed $29,980.00 cash under the rear seat.

The following is a review on the total value of the seizures involving consent searches:

COCAINE OF $1,090,900.00	24 POUNDS	STREET VALUE
MARIJUANA OF $3,586,365.00	1,578 POUNDS	STREET VALUE
CURRENCY OF $6780,723.00		VALUE

TOTAL VALUE = $5,347,988.00

AFFIDAVIT

STATE OF TEXAS

COUNTY OF TRAVIS

Before me, the undersigned authority in and for the State of Texas, on this the 28th day of March, 1996, personally appeared John C. West, Jr., who after being by me duly sworn, deposes and says:

My full name is John C. West, Jr. I am employed by the Texas Department of Public Safety and have been so employed since 1981. I am currently the Chief of Legal Services for the Texas Department of Public Safety, and have held that position since 1989.

In my capacity as Chief of Legal Services I am aware that in recent years a substantial number of seizures of controlled substances and contraband have been made by troopers of the Texas Department of Public Safety. Many of those seizures occurred during stops of traffic violators.

During 1995, the troopers in the Traffic Law Enforcement Division of the Texas Department of Public Safety made 779 seizures of controlled substances in which the amount seized was more than an amount that would be normally possessed by a mere user of controlled substances. These 779 seizures were all made following a stop of vehicle for a traffic violation. The controlled substances seized as a result of these stops amounted to 35,803 pounds of marijuana and 120,771 grams of cocaine, in addition to other substances. Also, over $3 million in currency believed to be associated with criminal activity was seized in 1995 arising from traffic violator stops.

A substantial number of the seizures of controlled substances or contraband resulted from voluntary consents to search obtained from a driver who had been stopped for a traffic violation.

I have read the above statement consisting of two pages. It is true and correct to the best of my knowledge.

_____

John C. West, Jr.

Subscribed and sworn to before me, the undersigned authority, on this the 28th day of March, 1996.

_____

Notary Public - State of Texas

Allen W. Smiley
Notary Public State of Texas
My Commission Expires
NOVEMBER 25, 1999.

(10)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Ohio

BRIEF OF OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF ROBERT D. ROBINETTE, RESPONDENT

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Lawyers*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED – AMICUS FORMULATION

WHERE THE HIGHEST COURT OF A STATE CREATES A PROPHYLACTIC RULE FOR THE PURPOSE OF PREVENTING VIOLATIONS OF RIGHTS ENJOYED BY ITS CITIZENS UNDER THAT STATE'S OWN CONSTITUTION, SHOULD THIS COURT EXERCISE ITS JURISDICTION TO REVIEW SUCH RULE UNDER FEDERAL CONSTITUTIONAL ANALYSIS?

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF AMICUS INTEREST

Amicus Curiae, The Ohio Association of Criminal Defense Lawyers ("OACDL"), is a private nonprofit association of five hundred twenty-five lawyers who represent the criminally accused and is affiliated with the National Association of Criminal Defense. Lawyers. Amicus OACDL seeks to provide the judiciary and legislature with the insight of its members concerning how the day-to-day operation of the criminal justice system impacts the citizens of the State of Ohio. Beyond this, however, amicus' members are deeply committed to the defense and vindication of the individual rights and civil liberties of the citizens of Ohio, from whatever source those rights may be derived, including those found within the constitution of the State of Ohio. With this in mind, the instant case is of particular importance to amicus insofar as amicus believes a fundamental issue involved, and one not heretofore examined in detail by the parties, is whether certiorari was properly granted in this case.

The case presently before this Court began as a routine traffic stop for the purpose of issuing a warning to Respondent about speeding in a construction zone; that traffic stop ended, however, with a felony drug arrest. What ensued in-between is the subject of the controversy: the arresting officer, after completing the purpose of his stop, took advantage of the situation to elicit Respondent's "consent" to search his vehicle, the search yielding contraband drugs.

On discretionary appeal, the Ohio Supreme court held that a "consensual encounter" between a motorist

and a police officer, immediately following an investigative detention, is "*likely* to be imbued with the authoritative aura of detention" thus rendering any purported consent "not consensual at all". *State v. Robinette*, 73 Ohio St. 3d 650, 655, 653 NE 2d 695, 699 (1995) (emphasis added). The Ohio Supreme Court observed that the narrow facts presented here demonstrate the need for the court to draw a "bright line be' 'een the conclusion of a valid seizure and the beginning of a consensual exchange". *Id.* at 654, 653 NE 2d at 698. This "bright line" takes the form of a verbal indication an officer must make to the motorist upon conclusion of the officer's business prior to any request for consent to search the vehicle for contraband: "At this time you legally are free to go." *Id.* at 654-55, 653 NE 2d 698-99. Twice in the body of the opinion below, the Ohio Supreme Court found this admonition warranted by the Ohio Constitution as well as the federal. *Id.*

Section 14, Article I of the Ohio Constitution states:

> **§ 14 Search warrants and general warrants.**
>
> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

These words are, of course, virtually identical to those of the Fourth Amendment of the United States Constitution. That should not be taken to indicate, however, that the former is merely co-extensive with, or is to

be read *in pari materia* with the latter.[1] In recent years, the Ohio Supreme Court has rejected such approaches to state constitutional exegesis, noting:

> One court has pointedly stated that "[w]hen a state court merely interprets the constitution of its state as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights", *Davenport [v. Garcia], supra*, 834 SW 2d at 12 [Tex. 1992].
>
> In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Arnold v. Cleveland, 67 Ohio St. 3d 35, 42, 616 NE 2d 163, 169 (1993).[2]

---

[1] *Cf. Pennsylvania v. Muniz*, 496 U.S. 582, 588, n.4 (1990) (commonwealth's constitutional protection against self-incrimination identical to that provided by the federal Fifth Amendment); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987) (state constitutional provision construed *in pari materia* with the federal Fourth Amendment).

[2] *See also State v. Brown*, 63 Ohio St. 3d 349, 352, 588 NE 2d 113, 115 (1992). ("If [*New York v.*] *Belton* [453 U.S. 454 (1981)] does stand for the proposition that a police officer may conduct

Amicus endorses the above-quoted language and seeks to increase Ohio's body of *state* constitutional jurisprudence. For this reason, amicus finds the instant case of particular significance. While there can be no doubt that "a State may not impose such greater restrictions [on police activity] as a matter of *federal constitutional law* when this Court specifically refrains from imposing them". *Oregon v. Haas*, 420 U.S. 714, 719 (1975), it is no less true that "[i]ndividual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution". *California v. Greenwood*, 486 U.S. 35, 43 (1988).[3]

Amicus would observe that the brief submitted by Petitioner, the State of Ohio, in this cause, as well as those of the amici writing in its support, concentrate their arguments entirely upon federal Fourth Amendment considerations. Amicus believes this overlooks a more fundamental, *jurisdictional* question which should first be considered by the Court. This is, at heart, a question of Federalism, with far broader ramifications than the limited search and seizure issue discussed by Petitioner and its friends of the court.

For the above-stated reasons and those discussed below, amicus curiae Ohio Association of Criminal

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a detailed search of an automobile *solely* because he has arrested one of its occupants, *on any charge*, we decline to adopt its rule.")

[3] *See also Minnesota v. Olson*, 495 U.S. 91, 102 (1990) (Stevens, J., dissenting). ("Only in the most unusual case should the Court volunteer its opinion that a state court has imposed standards on its own law enforcement officials that are too high.")

Defense Lawyers asks this Court to hold that the judgment of the Ohio Supreme Court in this case rests upon adequate and independent state grounds and dismiss the writ of certiorari as having been improvidently granted.

STATEMENT OF FACTS

Amicus Curiae, The Ohio association of Criminal Defense Lawyers, respectfully defers to the statement of facts and procedural posture submitted by Respondent in his merit brief in this case.

SUMMARY OF ARGUMENT

The opinion of the Ohio Supreme Court below is based on adequate and independent state grounds, to wit, Section 14, Article I of the Ohio Constitution. The rule fashioned by the court below is purely prophylactic and, as such, is not compelled by federal constitutional law. The writ of certiorari in this case should be dismissed as having been improvidently granted.

ARGUMENT

The Decision Of The Supreme Court Of Ohio Rests Upon Adequate And Independent State Constitutional Grounds, Thereby Precluding Review By This Court. The Writ Of Certiorari In This Case Should Be Dismissed as Having Been Improvidently Granted.

It has been a long established principle that this Court will not exercise its jurisdiction to review a judgment of a state court when such judgment rests upon adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Fox Film Corp. v. Muller*, 269 U.S. 207 (1935); *Murdock v. City of Memphis*, 87 U.S. [20 Wall.] 590 (1875). In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court adopted the following rule for determining under what circumstances the decision of a state supreme court is grounded upon an independent and adequate state law basis whereby this Court would decline review:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground

> is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41. It is the position of amicus OACDL that insofar as the decision below rests upon *both* the Fourth Amendment of the United States Constitution *and* Section 14, Article I of the Ohio Constitution, this Court should decline to review it.

The Ohio Supreme Court based its opinion in the instant matter to a decree upon its prior opinion in *State v. Chatton* 11 Ohio St. 3d 59, 463 NE 2d 1237 (1984), which held:

> . . . where a police officer stops a motor vehicle which displays neither front nor rear license plates, but upon approaching the stopped vehicle observes a temporary tag which is visible through the rear windshield, the driver of the vehicle may not be detained further to determine the validity of his driver's license absent some specific and articulable facts that the

> detention was reasonable. As a result, any evidence seized upon a subsequent search of the passenger compartment of the vehicle is inadmissible under the Fourth Amendment to the United States Constitution.

Id. at 63, 463 NE 2d at 1240-41. *Chatton*, however, should not be read as necessarily based *solely* on the Ohio Supreme Court's interpretation of the Fourth Amendment, as evidenced by footnote 4 of the opinion:

> We acknowledge that in January of this year the United States Supreme Court heard arguments on whether to recognize a good faith exception to the Fourth Amendment exclusionary rule. *Massachusetts v. Sheppard* (1982), 387 Mass. 488, 441 N.E. 2d 725, certiorari granted (1983), 77 L. Ed. 2d 1386; *United States v. Leon* (C.A. 9, 1983), 701 F.2d. 187, certiorari granted (1983), 77 L. Ed. 2d 1386. It would appear that a mistaken belief on the part of a police officer that an individual's conduct is a violation of the law would not fall within such a good faith exception if adopted by the Supreme Court. Nonetheless, even should a good faith exception to the exclusionary rule be recognized for Fourth Amendment purposes, the question remains whether we would likewise recognize such an exception under Section 14, Article I of the Ohio Constitution.

Chatton, supra at 63, 463 NE 2d at 1241, note 4. Although *Chatton* is ostensibly based upon Fourth Amendment grounds, the Ohio Supreme Court clearly suggests that its holding is alternatively mandated under the Ohio Constitution.

While the *Chatton* decision informs the opinion of the Ohio Supreme Court in Respondent's case, it can hardly be viewed as compelling it; indeed, *Chatton* provides only a spring-board premise for the "bright line" rule announced below. Confronted by the peculiar scenario of Respondent's case, the Ohio Supreme Court noted:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.
>
> The present case offers an example of the blurring between a legal detention and an attempt at consensual interaction. Even assuming that Newsome's detention of Robinette was legal through the time when Newsome handed back Robinette's driver's license, Newsome then said, "One question *before you get gone:* are you carrying any illegal contraband in your car?" (Emphasis added.) Newsome tells Robinette that before he leaves Newsome wants to know whether Robinette is carrying any contraband. Newsome does not ask if he may ask a question, he simply asks it, implying that Robinette must respond before he may leave. The interrogation then continues. Robinette is never told that he is free to go or that he may answer the question at his option.
>
> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of

authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

We are aware that consensual encounters between police and citizens are an important, and constitutional, investigative tool. *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389. However, citizens who have not been detained immediately prior to being encountered and questioned by police are more apt to realize that they need not respond to a police officer's questions. A "consensual encounter" immediately following a detention is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all.

Therefore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

While the legality of consensual encounters between police and citizens should be preserved, we do not believe that this legality should be used by police officers to turn a routine traffic stop into a fishing expedition for

unrelated criminal activity. The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution exist to protect citizens against such an unreasonable interference with their liberty.

State v. Robinette, supra at 654-55, 653 NE 2d at 698-99. The court below thus recognized that the scenario presented in Respondent's case is inherently problematic; when seized in one's automobile as part of a routine traffic stop, at what juncture that detention is transformed into a "consensual encounter" is fraught with ambiguity, and the risk of police taking unwarranted advantage of this ambiguity is high.[4] In an effort to *prevent* such misbehavior by the police, and in the *absence* of any

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[4] The scenario as played out in Respondent's case is virtually identical to that in *United States v. Sandoval*, 29 F.3d 537 (10th Cir. 1994) where in response to the motorist's question. "That's it?", the officer, with no articulable suspicion to continue the investigatory stop, replied. "No. Wait a minute." *Id.* at 538-39. Applying a "totality of the circumstances" analysis, the United States Court of Appeals for the Tenth Circuit held the motorist's consent to search was tainted by an unconstitutional seizure. *Id.* at 544-45. *Compare United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992); *United States v. Rivera*, 906 F.2d 319 (7th Cir. 1990); *United States v. Ruesga-Ramos*, 815 F. Supp. 1393 (E. Dist. Wash. 1993) (in all of which the investigatory stop was deemed terminated by the officer advising the motorist he was free to go). Under these cases, "bright line" rule notwithstanding, it would seem the Ohio Supreme Court has arrived at the correct *judgment* in holding the evidence inadmissible. *Cf. Herb, supra* at 125-26 ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.") (opinion of Jackson, J.).

supporting case law, state *or federal*, the Ohio Supreme Court set forth the "bright line" rule in controversy, holding it to be necessitated by the Ohio Constitution as well as the Fourth Amendment of the United States Constitution. The court below has fashioned, as Petitioner correctly observes, a *prophylactic* rule, not different in kind from this Court's exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), and more similar still to the "warning" required by *Miranda v. Arizona*, 384 U.S. 436 (1966). (See Brief of Pet. at 13-14; see also Brief of Amici States at 8, 14; Brief of Amicus United States at 11-12, 19-20). It is precisely the prophylactic nature of the rule devised by the court below which should serve to insulate the decision from federal review.

This Court has on numerous occasions taken the opportunity to discuss at length the concept of the term "prophylactic" and what the word implies in the context of the exclusionary rule. In its *Miranda* opinion, this Court noted:

> [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.

Miranda, supra at 467. "The prophylactic *Miranda* warnings therefore are not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected." *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (opinion of Rehnquist, C.J.); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (opinion of Rehnquist, J.); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (opinion of Rehnquist, J.).

"The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself", it necessarily "sweeps more broadly than the Fifth Amendment itself" and it "may be triggered even in the absence of a Fifth Amendment violation. . . . *Like all prophylactic rules*, the *Miranda* rule 'overprotects' the value at stake." *Duckworth, supra* at 209 (O'Connor, J., concurring) (citations omitted) (emphasis added). Similarly, "the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), was *not the inevitable product* of the Constitution but instead a judicially created remedy." *Withrow v. Williams*, ___ U.S. ___, 123 L.Ed. 2d 407, 426 (1993) (O'Connor, J., concurring in part and dissenting in part) (emphasis added). *See also Stone v. Powell*, 428 U.S. 465 (1976) (opinion of Powell, J.); *United States v. Calandra*, 414 U.S. 338 (1974) (opinion of Powell, J.).

In Respondent's case, the Ohio Supreme Court has fashioned a prophylactic rule to insure against the police taking unwarranted advantage of the power dynamics inherent in a routine traffic stop for the purpose of conducting purportedly consensual searches unrelated to the stop itself. While the court below based this rule in part on the Fourth Amendment, it also found support for it in the Ohio Constitution. But, as stated above, *by the very nature of a prophylactic rule*, the conclusion of the court below is not "required", *Long, supra* at 1041, by that court's understanding of federal law, anymore that it is "required" by the Ohio Constitution. Rather,

> The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the

> only effectively available way – by removing the incentive to disregard it.

Elkins v. United States, 364 U.S. 206, 217 (1960) (opinion of Stewart, J.). In assessing whether this prophylactic rule is based upon adequate and independent state grounds, that is, Section 14, Article I of the Ohio Constitution, amicus respectfully invites this Court to revisit an issue considered, but left unresolved, in the Court's opinion in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

In *Van Arsdall*, the Delaware Supreme Court had held that any improper restriction of a criminal defendant's right to cross-examine a prosecution witness for bias was *per se* violative of the confrontation clauses of the Sixth Amendment of the United States Constitution and Article I, Section 7 of the Delaware Constitution and further held that consideration of the "harmless error" analysis of *Chapman v. California*, 386 U.S. 18 (1967) was not mandated. On writ of certiorari, this Court reversed. Writing in dissent, Justice Stevens observed:

> Despite the directness of the route chosen, today's destination was not foreordained. Unlike *Michigan v. Long*, this case concerns whether the Court should presume jurisdiction to review a state supreme court's *remedy* for a federal constitutional violation. Since courts have traditionally enjoyed broad discretion to fashion remedies – even remedies forbidding otherwise lawful acts – once a constitutional violation has been proved, the more logical direction would have been to presume that a state court is merely exercising its normal supervisory power over state officials unless it clearly

> states that federal law requires a particular procedure to be followed. The Court's contrary presumption works a further advancement of its own power, but it flouts this Court's best traditions: it deviates from our normal approach to questions of subject-matter jurisdiction, and it departs from our long-standing practice of reserving decision on federal constitutional law. Even considered purely from the standpoint of managing our own discretionary docket, the Court's presumption includes a selection bias inconsistent with the lessons of history as revealed in this Court's statutory jurisdiction over the judgments of state courts. Finally, the Court's willingness to presume jurisdiction to review state remedies evidences a lack of respect for state courts and will, I fear, be a recurrent source of friction between the federal and state judiciaries.

Van Arsdall, supra at 690-91 (Stevens, J., dissenting) (footnote omitted). The majority of this Court, however, declined to examine Justice Stevens' argument in detail, stating only in a footnote,

> Respondent asserts that this Court is without jurisdiction to hear this case because the Delaware Supreme Court's automatic reversal rule rests on an adequate and independent state ground. He argues that the rule was adopted not on the basis of federal constitutional law but as a prophylactic device, announced under that court's "superintending" authority, to "send an unequivocal message" to state trial judges about the importance of permitting liberal cross-examination. Brief for Respondent 41. We disagree.

"[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Caldwell v. Mississippi*, 472 US 320, 327, 86 L Ed 2d 231, 105 S Ct 2633 (1985) (quoting *Michigan v Long*, 463 US 1032, 1040-1041, 77 L Ed 2d 1201, 103 S Ct 3469 (1983)). The opinion of the Delaware Supreme Court, which makes use of both federal and state cases in its analysis, lacks the requisite "plain statement" that it rests on state grounds. *Michigan v Long, supra*, at 1042, 1044, 77 L Ed 2d 1201, 103 S Ct 3469. *Indeed, the opinion makes no reference to any "superintending" authority, and nowhere suggests the existence of a state prophylactic rule designed to insure protection for a federal constitutional right. We read the decision below as resting on federal law.*

Id. at 678, note 3 (emphasis added). The instant case considers the same issue, that is, under what circumstances will a state court fashioned *remedy* be deemed as resting upon adequate and independent state grounds; this case, however, must be distinguished from *Van Arsdall* in several significant ways.

The opinion of the Delaware Supreme Court, although citing to the confrontation provision of the Delaware Constitution in a footnote, nevertheless arrived at its holding in large part by consideration of federal cases, most notably *Davis v. Alaska*, 415 U.S. 308 (1974); a *state* court decision, also relied upon, *Weber v. State*, 457 A 2d

674 (Del. 1983), spoke only of *federal* confrontation clause analysis. At no point in the Delaware Supreme Court's opinion did it suggest a departure from federal constitutional standards in favor of broader rights under the Delaware Constitution, nor was it ever suggested that that court intended to fashion a rule which would "send an unequivocal message." *See Van Arsdall v. State*, 486 A 2d 1, 6-7 (Del. 1984).

In Respondent's case, there is no question, and Petitioner concedes, that the Ohio Supreme Court's "at this time you legally are free to go" rule is *purely* prophylactic, which is to say, is not *syllogistically derived* from prior federal precedent, and therefore, it cannot be said that it "fairly appears to rest primarily on federal law or to be interwoven with the federal law". *Long, supra*, at 1040. Rather it must be viewed instead as a judicially created remedy, cut from whole cloth, based upon what the Ohio Supreme Court below found was necessary to "overprotect the value at stake" in Ohio's Constitution. *Cf. Duckworth, supra* at 209 (O'Connor, J., concurring). With this in mind, amicus suggests that "the most reasonable explanation that the state court decided the case the way it did" was emphatically *not* "because it believed that federal law required it to do so". *Long, supra* at 1041.

Amicus concedes that the opinion of the court below, resting as it does on a provision of the Ohio Constitution, unnecessarily undertakes a discussion of the federal Fourth Amendment. Certainly the preferable course for the Ohio Supreme Court would have been to "analyze the state's law, including its constitutional law, before reaching a federal constitutional claim". *Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (Stevens, J., concurring) (citing

Sterling v. Cupp, 290 Ore. 611, 614, 625 P2d 123, 126 [1983]). It is also conceded that the court below did not recite the "plain statement" contemplated by *Long*, although by doing so it would not have invited this Court's grant of certiorari. *Upton, supra* at 729-30 (Stevens, J., concurring). Magic words notwithstanding, Ohio's "bright line" rule, devised to insure compliance with Section 14, Article I of the Ohio Constitution, is clearly supported by adequate and independent state constitutional grounds, and this Court should dismiss the writ. Alternatively, if this Court finds that the decision of the court below, "even if arguably placed on a state ground, embodies a misconstruction of federal law threatening gravely to mislead, or to engender disuniformity, confusion or instability, a Supreme Court order vacating the judgment and remanding for clarification should suffice." *Arizona v. Evans*, 514 U.S. ___, 131 L.Ed. 2d 34, 59, note 7 (1985) (Ginsburg, J., dissenting).[5]

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[5] Amicus would respectfully remind the Court that for practical purposes this often is the result in any event, providing for an unfortunate and ever-increasing jurisprudence of advisory opinions, a constitutional evil the rule in *Long* was devised to avoid. *See Montana v. Hall*, 481 U.S. 400, 411 (1987) (Stevens, J., dissenting); *Ponte v. Real*, 471 U.S. 491, 503, n.4 (1985) (Stevens, J., dissenting); *Herb, supra* at 126 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.") (opinion of Jackson, J.).

CONCLUSION

For the above-stated reasons, amicus curiae, the Ohio Association of Criminal Defense Lawyers, respectfully urges this Honorable Court to dismiss the writ of certiorari as having been improvidently granted in this case.

Respectfully submitted,

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No. 95-891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF OHIO,

Petitioner,

—v.—

ROBERT D. ROBINETTE,

Respondent.

ON WRIT OF *CERTIORARI* TO THE OHIO SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OHIO IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights. The ACLU of Ohio is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases involving the Fourth Amendment. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of significant concern to the ACLU and its members.

STATEMENT OF THE CASE

The facts are not contested. On August 3, 1992, Deputy Roger Newsome of the Montgomery County Sheriff's Department was on drug interdiction patrol on Interstate 70 when he stopped respondent, Robert Robinette, for speeding through a construction zone. Following his usual practice, Newsome had already decided to issue respondent a verbal warning before even approaching respondent's car. Pet. App.2.

After obtaining respondent's driver's license and determining that there were no outstanding warrants or violations, Newsome asked respondent to exit his vehicle and stand between his car and Newsome's cruiser. Newsome then activated his cruiser's video camera to videotape the encounter with respondent. As he had planned from the outset, Newsome warned respondent about speeding and returned his driver's license. This did not, however, end the encounter. Rather, Newsome continued: "One question be-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

fore you get gone [sic]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"[2] Pet.App.2.

Respondent gave a negative reply to Newsome's inquiry about contraband. Newsome nevertheless asked for permission to search respondent's car. Respondent testified at the suppression hearing that he was shocked at Newsome's request to search the car and "automatically" answered "yes." Newsome testified that he routinely asked permission to search the cars of motorists he had stopped. Pet.App.2-3; J.A.18-20, 26-27. After searching respondent's car, Newsome found a small amount of marijuana and a pill, later identified as methylenedioxy methamphetamine, which was the basis for respondent's arrest and indictment under Ohio Rev. Code Ann. §2925.11(A)(Supp. 1996). Pet.App.3.

The trial judge denied respondent's motion to suppress the evidence found in his car but the court of appeals reversed. The appellate court ruled that "a reasonable person in [respondent's] position would not believe that the investigative stop had been concluded, and that he or she was free to go, so long as the police officer was continuing to ask investigative questions." Because there was no reasonable suspicion to continue detaining respondent, the court of appeals held that the consent obtained from respondent was the fruit of an unlawful detention. Pet.App.17-18.

The Ohio Supreme Court affirmed the appellate court's ruling. The court concluded that the search was invalid "since it was the product of an unlawful seizure." *Id.* at 4. It found that "the entire chain of events, starting when Newsome had [respondent] exit the car and stand within the field of the video camera, was related to the questioning of [respondent] about carrying contraband." This questioning "was not related to the initial speeding stop and . . . was not based on any specific or articulable facts that would provide probable cause for the extension of the scope of the seizure of [respondent and his passenger.]" *Id.* at 6-7.

[2] Newsome also questioned respondent about luggage inside respondent's car.

The court explained that "[m]ost people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them." To secure the constitutional rights of motorists seized by the police, the court below ruled that "citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase 'At this time you legally are free to go' or by words of similar import." *Id.* at 9.

In this Court, the state and its *amici* contend that the court below erred in imposing a bright-line rule for judging whether respondent's detention continued at the time that Deputy Newsome requested and obtained consent to search the car. Petitioner argues that a totality of the circumstances test is the correct standard for determining whether the encounter between respondent and Newsome was consensual *vel non*.

SUMMARY OF ARGUMENT

This Court's cases recognize that "[s]treet encounters between citizens and police officers are incredibly rich in diversity." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Ignoring that diversity, the petitioner argues that this case should be treated no differently than an encounter between the police and a citizen walking down the street. Such an encounter is deemed to be an "arm's length" meeting. Absent some restraining action by the officer, the law presumes that the cit-

izen is free to answer the officer's questions or walk away, and that the average person is aware of these options and thus has not been seized under the Fourth Amendment.

The court below correctly recognized that this constitutional paradigm is inapposite when the police stop a motorist on the highway. Under these circumstances, a seizure has unquestionably occurred. Moreover, once a seizure has occurred (as in respondent's case), the encounter between the police and citizen is no longer a balanced meeting. The nature of the confrontation not only may cause "substantial anxiety" for the motorist, *Delaware v. Prouse*, 440 U.S. 648, 657 (1979), the officer's conduct and discretion also dictate the pace and resolution of the encounter. Unlike the pedestrian free to ignore an approaching officer, a motorist seized by the police is not positioned to know the lawful limits of the officer's authority, nor the existence of his own right to leave or terminate the seizure. Accordingly, the totality test of the consensual encounter cases is unsuited for judging the legality of an officer's continued questioning of a motorist subject to police seizure.

This Court's cases also reveal that bright-line rules are appropriate to delineate the constitutional boundaries of traffic stops. Many of the Court's affirmative rules in motorist seizure cases expand the power of the police to advance officer safety or to provide guidance to the officer in the field. On the other hand, bright-line rules that restrict police authority are proper when there is the potential for the abuse of police discretion. The court below correctly announced a clear rule to check the substantial discretion afforded officers who execute traffic detentions.

The ruling below upholds a fundamental principle of this Court's investigative detention cases. The investigative practices used by officers during traffic stops must be strictly tied to the reasons which justify the detention. Once the purpose for the traffic stop has been satisfied, questioning a

motorist about matters unrelated to the stop, absent just cause, is unreasonable. Finally, the decision below will protect the liberty, privacy and security interests of thousands of innocent motorists who otherwise would be delayed in their travel plans and asked to surrender the privacy of their automobiles and luggage without good cause.

ARGUMENT

I. THE CONSENSUAL ENCOUNTER CASES REST ON THE PREMISE THAT THE ORDINARY POLICE-CITIZEN ENCOUNTER IS AN "ARM'S LENGTH" MEETING. THE REASONING OF THOSE CASES IS INAPT WHEN AN OFFICER CONTINUES TO QUESTION A CITIZEN SEIZED FOR A TRAFFIC STOP

Fourth Amendment interests are not triggered unless a "search" or "seizure" has occurred. Not every encounter between an officer and a citizen is a seizure. This Court's cases establish that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983)(plurality opinion). If the reasonable person would feel "free to disregard the police and go about his business," *California v. Hodari D.*, 499 U.S. 621, 628 (1991), or "feel free to decline the officers' requests or otherwise terminate the encounter," *Bostick*, 501 U.S. at 436, no seizure has occurred and no reasonable suspicion is required to justify the officer's conduct. Whether a person has been seized depends upon the totality of the circumstances surrounding the encounter. *Id.* at 439-40 (rejecting a *per se* rule deciding the seizure issue on the fact that the police-citizen encounter took place on a bus); *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)(rejecting a bright-line rule for determining

whether a police chase constitutes a seizure).

Thus, the police may approach a person and ask questions, *INS v. Delgado*, 466 U.S. 210, 216 (1984); seek to examine a person's identification or travel documents, *Bostick*, 501 U.S. at 437; *Delgado*, 466 U.S. at 216; *Royer*, 460 U.S. at 501; *United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980)(opinion of Stewart, J.); pursue a pedestrian as he runs down the street, *Chesternut*, 486 U.S. at 576; and request consent to search a person's luggage, *Bostick*, 501 U.S. at 437; *Royer*, 460 U.S. at 501. None of these encounters will trigger Fourth Amendment scrutiny provided "the police do not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 435; *accord Chesternut*, 486 U.S. at 574 (police chase not a seizure because it "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [Chesternut's] freedom of movement").

Although not mentioned by petitioner or its *amici*, all of the Court's consensual encounter cases have a common trait: each involved persons at liberty to come and go as they please. The status of the individual is crucial because the Court has decided that, as a matter of law, the typical police-citizen encounter will not constitute a seizure even though few persons actually exercise their right to ignore the police. This constitutional norm rests on two related premises. First, the reasonable, innocent person[3] will normally

[3] The test for determining whether a seizure has occurred is an objective standard that "presupposes an *innocent* person." *Bostick*, 501 U.S. 501 U.S. at 438 (emphasis in original); *Chesternut*, 488 U.S. at 574 (the reasonable person test is an objective standard, which "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached"). Thus, respondent's subjective belief, elicited on cross-examination at the suppression (continued...)

cooperate with the police and sees the ordinary police-citizen encounter as an "arm's length" meeting designed to serve the community at-large. Second, a contrary rule would bar many valid law enforcement practices, particularly "the need for police questioning as a tool in the effective enforcement of the criminal laws." *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.).

In contrast to the *Mendenhall-Royer-Bostick* line of cases, the Court has recognized that the objective intrusion, authority of the police, and potential for the abuse of discretionary power involved whenever a motorist is stopped and questioned by the police, raise distinct Fourth Amendment issues. Whenever a police officer stops a motorist in transit, a seizure has occurred. Stopping a vehicle and detaining its occupants is a seizure under the Fourth Amendment "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. at 653. A traffic stop interrupts a motorist's "freedom of movement," is annoying and time consuming, and often generates "substantial anxiety," even for the law-abiding motorist who has not committed a crime. *Id.* at 657. Similarly, when a motorist is stopped and questioned at a sobriety roadblock or other official checkpoint, a seizure has occurred. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

The authority of the police, the dynamics surrounding a

[3] (...continued)
hearing, *see* J.A.29, that he was free to leave the encounter after Newsome returned his driver's license, is not decisive. *See also Hodari D.*, 499 U.S. at 628 (the seizure standard "is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person").

traffic stop and common sense have led this Court to declare that "[c]ertainly few motorists would feel free to either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984).[4] Because of the "unsettling show of authority" and "substantial anxiety" associated with traffic stops, *Prouse*, 440 U.S. at 657, police officers may not approach or signal a motorist in transit to stop and listen to their questions as they can a pedestrian. "Stopping or diverting an automobile in transit . . . is materially more intrusive than a question put to a passing pedestrian, and the fact that the former amounts to a seizure tells very little about the constitutional status of the latter." *Mendenhall*, 446 U.S. at 556-57 (opinion of Stewart, J.).

This Court's cases also recognize that police seizures of motorists differ from questions put to pedestrians in another way. Because "[v]ehicle stops for traffic violations occur countless times each day," *Prouse*, 440 U.S. at 659, and every motorist is subject to a "multitude of applicable traffic and equipment regulations," *id.* at 661, -- rules which are not applicable to pedestrians -- police officers have substantial discretion when deciding which motorists to stop and how each stop will be resolved. In this case, for example, Deputy Newsome gave respondent a verbal warning, although he could have issued a speeding ticket. The average motorist is aware of this discretionary authority, which adds to the tension of the typical traffic stop. Because an officer might abuse his or her authority either in deciding which motorists to stop or how those stops will be resolved, this

[4] Many states have laws against resisting or fleeing from an officer's lawful order to stop. *See, e.g.*, Fla.Stat. §316.1935 (Supp. 1996); Ohio Rev. Code Ann. §2921.331 (1994); Nev.Rev.Stat.Ann. §484.348 (Supp. 1995); Wash.Rev. Code §46.61.021 (West Supp. 1996); 75 Pa.Cons. Stat.Ann. §3733 (West Supp. 1995).

Court has imposed constitutional rules for motorist detentions that are not applicable to police-pedestrian encounters.

For example, in *Prouse*, the Court ruled that a discretionary spot-check to verify a motorist's driver's license and registration was unconstitutional. "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.* at 661. Accordingly, *Prouse* ruled that, absent reasonable suspicion that a motorist has committed a traffic violation or some other offense, randomly detaining a motorist to examine driving documents is unreasonable under the Fourth Amendment. *Id.* at 663. *See also United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)(border patrol agents may stop a vehicle near the border and question its occupants only if there is reason to suspect that the car may contain illegal aliens).

Similarly, in *Sitz* and *Martinez-Fuerte*, although the Court rejected Fourth Amendment challenges to a sobriety checkpoint and an interior Border Patrol permanent checkpoint, respectively, it stressed, *inter alia*, the standardized procedures that governed each seizure. In *Sitz*, all vehicles passing through the sobriety checkpoint were stopped and drivers were briefly examined for signs of intoxication. 496 U.S. at 447. Because all drivers approaching the checkpoint were stopped, the seizure did not afford the police the unchecked discretion inherent in the random stops at issue in *Prouse*. *Sitz*, 496 U.S. at 454.[5] Likewise, in *Martinez-Fuerte*, the Court emphasized that permanent checkpoints

[5] *See* 4 Wayne F. LaFave, SEARCH AND SEIZURE §10.8(d) at 706 (3d ed. 1996)("[T]he manner in which the [sobriety] checkpoint is operated must be such that motorists 'realize that they have been stopped as part of a routine checkpoint operation' and not singled out")(footnote omitted).

run by the Border Patrol were not as intrusive on the motoring public as a random roving-patrol. At a fixed checkpoint, motorists "are not taken by surprise" by the presence of the police. 428 U.S. at 559. Moreover, because of the "regularized manner in which established checkpoints are operated . . . field officers may stop only those cars passing the checkpoint [which leaves less] room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." *Id.*[6]

As the Court's cases illustrate, there are sound reasons why pedestrian encounters and motorist seizures are controlled by different Fourth Amendment rules. When a citizen is approached by the police on the street, inside an airport terminal, or while sitting on a bus, the law operates on the assumption the person remains free to go about his or her business and ignore the officer unless the officer indicates that compliance with his demands is required.[7] Simply stated, the Fourth Amendment treats the typical police-citizen encounter as a balanced meeting: the officer is free to question the citizen, but the citizen is free to walk away from the officer. The arm's length nature of the encounter explains why the Court has repeatedly declared that a person's refusal to cooperate with an officer does not justify, even momentarily, a detention. Nor does a refusal to listen or answer an officer's inquiry provide reasonable grounds to

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[6] *See* LaFave, *supra*, §10.8(d) at 696 (a central theme of *Martinez-Fuerte* is that "a police procedure is less threatening to Fourth Amendment values when the *discretionary* authority of the police (and thus the risk of arbitrary action) is kept at an absolute minimum")(emphasis added).

[7] *Cf. Brown v. Texas*, 443 U.S. 47 (1979)(when police have no suspicion of criminality and appellant refused to identify himself and angrily asserted that the police had no right to stop him, the police unreasonably seized appellant when they detained and frisk him for identification).

detain. *Bostick*, 501 U.S. at 437; *Delgado*, 466 U.S. at 216-17; *Royer*, 460 U.S. at 498 (plurality opinion).

In contrast, a motorist seized by the police is not positioned to ignore the officer or his questions. Once a seizure has occurred, the encounter is no longer balanced and the officer dictates the pace and circumstances of the confrontation. The atmosphere and objective intrusion of the seizure may create fear and distress for many law-abiding motorists. Where a police-citizen confrontation begins in a climate of "substantial anxiety," *Prouse*, 440 U.S. at 657, and is controlled by the discretion of the officer in the field, the totality of the circumstances test of the consensual encounter cases is inapt because it is designed to assess the perspective of citizens at liberty to come and go as they please. Unlike a person free to ignore an inquiring officer, a motorist seized by the police is not positioned to know the lawful limits of the officer's authority, nor the extent of the his own right to leave or terminate the seizure.[8]

The claim pressed by the dissent of Justice Sweeney below, Pet.App.13-14, that this case turns entirely on the issue of consent, is plainly wrong. The issue of whether respondent was lawfully "seized" at the time Deputy Newsome requested consent to search is a distinct question from whether he validly "consented" to the search. Because respondent was unlawfully seized at the time he gave consent to search, the validity of the search turns on whether the consent has been purged of the taint of the illegal seizure.[9] That deter-

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[8] *Cf. Camara v. Municipal Court*, 387 U.S. 523, 532 (1967)(homeowner confronted with an official housing inspector demanding a warrantless entry has "no way of knowing the lawful limits of the inspector's power to search").

[9] *Royer*, 460 U.S. at 501 (plurality opinion)("*Dunaway [v. New York*, 442 U.S. 200, 218-19 (1979)] and *Brown [v. Illinois*, 422 U.S. at 590, (continued...)

mination requires the consideration of three factors: the temporal proximity of the illegal seizure and the consent; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. *Taylor v. Alabama*, 457 U.S. 687, 690 (1982), quoting *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). The prosecution bears the burden of proving that evidence obtained as a direct result of an illegal seizure is admissible. *Id.*

Here, the continued illegal detention of respondent and the consent to search were intimately connected in time and circumstance. Respondent gave consent instantly; the continued illegal detention and consent were hand-in-glove. As the court below concluded:

> [T]here was no time lapse between the illegal detention and the request to search, nor were there any circumstances that might have served to break or weaken the connection between one and the other. The sole purpose of the continued detention was to illegally broaden the scope of the original detention. [Respondent's] consent clearly was the result of his illegal detention, and was not the result of an act of will on his part.

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[9] (...continued)
601-02 (1975)] hold that statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will"); *see also Bostick*, 501 U.S. at 434 (noting that if a seizure took place without reasonable suspicion, drugs found in Bostick's suitcase after a consent search "must be suppressed as tainted fruit"); *id.* at 447 (Marshall, J., dissenting)(If a person "was unlawfully seized when the officers approached him and initiated questioning, the resulting search was likewise unlawful no matter how well advised [the person] was of his right to refuse it").

Pet.App.7. Put simply, there was no "demonstrably effective break in the chain of events leading from the illegal [seizure] to the [consent]." *Brown v. Illinois*, 422 U.S. at 611 (Powell, J., concurring in part). This case therefore is easily distinguishable from *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In *Bustamonte*, the Court held that a consent search may still be constitutional even though an officer failed to inform a person of their right to refuse such a search. *Id.* at 248-49. Here, respondent's claim is that his consent invalid because it was inextricably tied to his illegal detention.

II. BECAUSE OF THE NATURE OF THE OBJECTIVE INTRUSION AND THE RISKS AND INTERESTS INVOLVED FOR BOTH THE OFFICER AND MOTORIST, BRIGHT-LINE RULES DO CONTROL MOTORIST SEIZURES

Due to the attendant circumstances and interests at stake for both the officer and the motorist, this Court has adopted bright-line rules to outline the initiation and permissible scope of motorist detentions. The ruling below fits neatly within the framework of the Court's prior motorist seizure cases.

"Bright-line fourth amendment rules come in two forms." Albert W. Alschuler, "Bright Line Fever and the Fourth Amendment," 45 U.Pitt.L.Rev. 227, 242 (1984). Many of this Court's bright-line rules expand the power of the police during motorist detentions, while other bright-line rules check the discretion of the police. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(*per curiam*), is an example of the former category. *Mimms* held that an officer may exercise discretion to order a driver, validly stopped for a traffic violation, to exit his or her vehicle even absent any particularized suspicion that the driver is presently armed and dan-

gerous. This bright-line rule was justified by the twin rationales of officer safety and the minimal intrusion involved for the motorist who has already been lawfully seized. *Id.* at 110-11.

Michigan v. Long, 463 U.S. 1032 (1983), and *New York v. Class*, 475 U.S. 106 (1986), are additional examples of categorical rules articulated by the Court that expand the authority of the police during traffic stops. In *Long*, officers on patrol in a rural area observed Long's car travelling erratically and speeding. After the officers saw the car drive into a ditch, they stopped to investigate. When Long, who appeared to be intoxicated, headed toward his car to produce his vehicle registration, the officers followed and observed a large hunting knife inside the car. After a frisk of Long's person revealed no weapons, an officer searched the inside of the car for other weapons. The search revealed a quantity of marijuana. 463 U.S. at 1034.

Prior to *Long*, the Court had not approved an investigative search of a car without probable cause to believe that contraband or evidence of a crime was within the vehicle. Yet, *Long* held that a protective search of the passenger compartment is permissible when police have a reasonable belief that an occupant of a car is dangerous and may gain immediate control of weapons. *Id.* at 1050. This expansion of police authority was justified by the recognition that motorist seizures "are especially fraught with danger to police officers," and that "suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed." *Id.*[10]

[10] While *Long* noted that its ruling "does not mean that police may conduct automobile searches *whenever* they conduct an investigative stop," 463 U.S. at 1050, n.14 (emphasis in original), they are free to do so when they have "the level of suspicion identified in *Terry*." *Id.*

In *New York v. Class*, 475 U.S. 106, the question before the Court was whether "a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN [Vehicle Identification Number] after its driver has been stopped for a traffic violation and has exited the car." *Id.* at 107. In *Class* it was "undisputed that the police officers had no reason to suspect that [Class'] car was stolen, that it contained contraband, or that [Class] had committed an offense other than the traffic violations." *Id.* at 108. And the *Class* Court recognized that an officer's reaching into a car to move the papers covering the VIN was a search under the Fourth Amendment. *Id.* at 111.

Despite the absence of probable cause justifying a search, the *Class* Court ruled that the search of the Class' vehicle was reasonable. Relying on the reasoning of *Mimms*, the Court identified three factors that made the search constitutional: the search promoted the safety of the officers; the search was minimally intrusive; and the search stemmed from directly observing Class commit a traffic violation. *Id.* at 115. Consequently, a police search may be "piggy-backed" onto a traffic stop whenever there is a need to move objects obscuring the VIN.

Finally, in *New York v. Belton*, 453 U.S. 454 (1981), an officer stopped a car for speeding. While requesting identification from the occupants of the vehicle, the officer smelled the odor of burnt marijuana. After ordering the occupants out of the car, the officer searched the passenger compartment, including the pocket of a jacket belonging to Belton. Inside the pocket was cocaine. The search raised an issue that had generated conflicting results in the lower courts, namely, the proper scope of a search of the interior of a car incident to a lawful arrest of its occupants.

Emphasizing the need for a bright-line rule to guide to officers in the field, *Belton* ruled that "when a policeman

has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment [and any closed containers therein] of that automobile." *Id.* at 460 (footnote omitted). The ruling in *Belton*, like the definitive rulings in *Mimms*, *Long* and *Class*, augmented the power of officers conducting traffic detentions.

In comparison to the affirmative rules discussed above which extend police power, bright-lines sometimes work to check police discretion. As noted, the result in *Prouse* is a classic example of a peremptory rule that reduces the power to search and seize. When there is a "'grave danger' of abuse of discretion," 440 U.S. at 662, the *Prouse* Court reaffirmed that categorical rules are necessary to check the discretion of officers who might use their authority to undermine Fourth Amendment interests.[11] The same concerns are extant in this case.

Every law-abiding motorist will sometime commit a traffic violation. As Justice Stevens has properly noted, "to be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky." *Sitz*, 496 U.S. at 465 (Stevens, J., dissenting). Thus, even the most innocent motorist faces the likelihood of being seized for a traffic violation. When such a seizure occurs, the officer not only controls the pace and scope of the seizure,[12] the officer

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[11] *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) ("The search [of petitioner's car] was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camara [v. Municipal Court*, 387 U.S. 523, 532-33 (1967)] when it insisted that the 'discretion of the officer in the field' be circumscribed").

[12] *Cf. New York v. Banks*, 650 N.E. 2d 833, 835 (N.Y.Ct.App. 1995) (continued...)

also retains substantial discretion in deciding how and when the seizure will end. The ruling below announces a sensible and easily administered safeguard to restrain the considerable discretion held by officers during traffic stops.

Just as this Court acknowledged few motorists would feel free to disobey a police signal to stop or to depart the scene of a traffic stop "without being told they might do so," *Berkemer v. McCarty*, 468 U.S. at 436, the court below wisely concluded that an equally small number of motorists will be aware of the legal limits of an officer's authority during a traffic seizure:

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[12] (...continued)
(State trooper "readily admitted that he delayed issuing the traffic tickets and returning the licenses and rental agreement to defendant and Jones for the specific purpose of effecting a search of the automobile"); *Powell v. Florida*, 649 So.2d 888, 889 (Fla.Ct.App. 1995)("It is clear from [the officer's] testimony that once he stopped the vehicle, no matter what event transpired subsequent to the initial stop, he would have conducted an exterior search with the K-9 unit [drug sniffing dog] because, [the officer] testified, he did so in virtually all traffic stops"); *United States v. Buchanon*, 72 F.3d 1217, 1228 (6th Cir. 1995)(State trooper "testified that as part of his drug interdiction unit's investigative method, he 'automatically' uses Fando [trooper's drug sniffing dog] to perform a narcotics sniff on every vehicle his unit stops"). Jeff Brazil, "Videotape Gives A Look at Volusia Squad's Tactics," Orlando Sentinel Trib., June 17, 1992 (Police videotape showed that "[w]hen one motorist refused a [consent] search, a drug dog was escorted around the car twice. Deputies searched the man's car. Nothing was found"); Jeff Brazil & Steve Berry, "Seizing Cash is no Sweat for Deputies," Orlando Sentinel Trib., June 14, 1992 ("What happened after cars were ordered to the roadside is the key. Once the deputy issued a warning or -- in rare cases -- a citation, he would turn and begin walking away, according to dozens of drivers interviewed. The deputy then would pause, return to the car and ask permission to search. In most cases, drivers consented. Records show that at least a handful of drivers initially refused to allow a search. They were told they would be detained until a drug-sniffing dog could be summoned. The drivers allowed the searches").

> Most [motorists] believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person [who has been seized for a traffic violation] would not feel free to walk away as the officer continues to address him.

Pet.App.9.

The consequence of the petitioner's position is manifest: according to petitioner, officers should be afforded the discretion to continue questioning otherwise innocent motorists about matters unrelated to a traffic stop even when there is no reasonable suspicion to justify continuing the seizure. The fact that many thousands of innocent motorists will be subjected to this police power, or will not object to officer's search of their cars,[13] is beside the point. As Justice O'Connor declared last Term, "evenhanded treatment [is] no substitute for the individualized suspicion requirement." *Vernonia School Dist. 47J v. Acton*, 515 U.S. __, __, 115 S.Ct. 2386, 2398 (1995)(dissenting opinion). "Protection of privacy, not evenhandness, was [for the Framers] and is now the touchstone of the Fourth Amendment." *Id.* at 2399.

In sum, a review of this Court's motorist seizure cases indicates that bright-line rules which *expand* police power to search and seize are often appropriate constitutional norms to promote officer safety and provide guidance to officers in the field. But bright-line rules cut both ways. This Court's cases equally reveal that definitive rules which *restrain* police power are proper where there is the potential for the abuse of police discretion. The court below properly announced a clear rule to control the discretion of the officer in the field, "at least to some extent." *Prouse*, 440 U.S. at 661. A contrary ruling -- to allow an officer to continue questioning an innocent motorist about matters unrelated to the traffic stop when there is no cause for such interrogation -- sanctions the very evil condemned in *Prouse*.[14]

[13] Daniel L. Rotenberg, "An Essay on Consent(less) Police Searches," 69 Wash.U.L.Q. 175, 187-90 (1991).

III. THE INVESTIGATIVE TECHNIQUES OF THE POLICE DURING TRAFFIC STOPS MUST BE STRICTLY TIED TO THE REASONS WHICH JUSTIFY THE DETENTION. ONCE THE PURPOSE FOR THE TRAFFIC STOP HAS BEEN SATISFIED, CONTINUED QUESTIONING OF MOTORISTS ABOUT MATTERS UNRELATED TO THE STOP, ABSENT JUST CAUSE, IS UNREASONABLE

When considering challenges to police intrusions that occur in the context of a motorist detention, the Court has always looked to the reasonableness component of the Fourth Amendment. As stated in *Prouse*, 440 U.S. at 654, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Traditionally, the reasonableness standard demands, "at a minimum," that intrusions by the police "be capable of measurement against 'an objective

[14] *Cf. Ohio v. Chatton*, 463 N.E.2d 1237, 1240 (Ohio Sup.Ct. 1984) (where officer "no longer maintained a reasonable suspicion that [motorist's] vehicle was not properly licensed or registered, to further detain [motorist] and demand that he produce his driver's license is akin to the random detentions struck down" in *Prouse*).

standard,' whether this be probable cause or a less stringent test [of suspicion]." *Id.* (footnotes omitted); *Acton*, 115 S.Ct. at 2402 (O'Connor, J., dissenting)("history and precedent establish that individualized suspicion is 'usually required' under the Fourth Amendment (regardless of whether a warrant and probable cause are also required)").

The definitive statement of the Fourth Amendment's objective standard for judging the legality of intrusions falling short of an arrest or full search was announced in *Terry v. Ohio*, 392 U.S. at 19-20: "[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one -- whether the officer's actions was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." The ruling below, which requires an officer to signal the termination of the stop before continuing to question a motorist about matters outside of the scope of the valid detention, sustains the principles required by this Court's rulings for evaluating the legality of motorist seizures.

Motorists enjoy significant interests in automobile travel that are protected by the Fourth Amendment. *Prouse*, 440 U.S. at 662-63. Where, however, an officer has reasonable grounds that a traffic violation or other offense is in progress, a limited detention is proper. Under this Court's precedents, while the police are not necessarily required to utilize the "least restrictive means" available in completing an investigative stop,[15] they must ensure that the stop "be temporary and last no longer than necessary to effectuate the purpose of the stop." *Royer*, 460 U.S. at 500 (plurality opinion); *accord*, *Brignoni-Ponce*, 422 U.S. at 881 ("the stop and inquiry must be 'reasonably related in scope to the justification for their initiation'"), quoting *Terry*, 392 U.S.

[15] *See United States v. Sharpe*, 470 U.S. 675, 687 (1985).

29; *cf. Sharpe*, 470 U.S. at 685-86 (investigative detention of motorist must be brief and police must diligently pursue a means of investigation that will likely confirm or dispel their suspicions quickly).

The ruling below advances the constitutional command required of all temporary seizures, including traffic stops, that an officer's investigative practices "must be 'strictly tied to and justified by' the circumstances which render its initiation permissible." *Terry*, 392 U.S. at 19 (citations omitted). Indeed, the decision below follows a long line of lower court rulings that have held that the police, in the context of a valid traffic stop, may not question a motorist about matters unrelated to the traffic stop, unless there is independent cause for such questioning.[16]

[16] *See, e.g., United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994) (once trooper realized that reasons for traffic stop were unwarranted, the stop should have terminated and trooper's questions and request for driver's license of motorist violated the Fourth Amendment); *United States v. Walker*, 933 F.2d 812, 817 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1168 (1992)(holding that when a defendant, stopped for speeding, established to the police officer that he had a license and was entitled to operate the vehicle, the officer's further detention for questioning about guns and drugs was illegal); *United States v. Thomas*, 863 F.2d 622, 628-629 (9th Cir. 1988)(where suspect at a traffic stop had satisfied the reasonable suspicion giving rise to the stop, continued detention for questioning about a gun was illegal); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2015 (1995)(stating that, if the driver provides no inconsistent answers and no objective circumstances supply a police officer with additional suspicion, the officer should not expand the scope of the stop); *State v. Washington*, 623 So. 2d 392, 397 (Ala.Crim.App. 1993)(once the defendant signed his speeding ticket, he should have been released by the detaining officer absent further reasonable suspicion; further questioning quickly evolved into an illegal detention); *United States v. Obasa*, 15 F.3d 603, 607 (6th Cir. 1994)(holding that once the circumstances giving rise to a stop are resolved, the detainee must be released); *Colorado v. Redinger*, 906 P.2d

(continued...)

The position of petitioner conflicts with the demands of this Court's Fourth Amendment holdings that investigative seizures be "strictly circumscribed by the exigencies which justify its initiation." *Terry*, 392 U.S. at 26. When the police have reasonable suspicion (but not probable cause) of criminal activity, the balancing formula used by the Court provides sufficient flexibility for an officer to conduct her investigation in a manner that is "likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Sharpe*, 470 U.S. at 686. When an officer is "diligently pursu[ing]" her investigation, *United States v. Place*, 462 U.S. 696, 709 (1983), this Court will not subject an officer's conduct to "unrealistic second-guessing" on alternative means of investigation. *Sharpe*, 470 U.S. at 686-87.

On the other hand, when the reasons for commencing the investigation have been satisfied, further intrusions and interrogation are unreasonable. In the context of a traffic stop, once the purpose for the stop has been fulfilled and no additional grounds for continuing the seizure exist, questioning a motorist about matters unrelated to the stop violates the cardinal rule that an officer's conduct be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20.

Here, once Deputy Newsome had determined that respondent was lawfully on the road and would be issued a verbal warning for speeding, the purposes for stopping respondent were completed. Instead of terminating the seizure at this point, and without any suspicion of criminality, Newsome continued his "routine" of questioning respondent about guns and contraband.[17] There was no nexus between this questioning and the reasons for stopping respondent. It

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[16] (...continued)
81 (Col.Sup.Ct. 1995)("[w]hen . . . the purpose for which the investigatory [traffic] stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for continued detention and interrogation of citizens")(footnote omitted); and *United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir.), *cert. denied*, 113 S.Ct. 2427 (1993)(asserting agreement with the Tenth Circuit that "extensive questioning about matters wholly unrelated to the purpose of a routine traffic stop may violate the Fourth Amendment")(*dicta*). *See also* LaFave, *supra*, §9.2(f) at 53, n.143 & 61-62 ("[I]f a person is stopped on suspicion that he has just engaged in criminal activity, but the suspect identifies himself satisfactorily and investigation establishes that no offense has occurred, there is no basis for further detention, and the suspect must be released").

Concerning petitioner's claim that a motorist in respondent's shoes is no longer subject to seizure after his driver's license has been returned, Professor LaFave has reasoned as follows:

> T[his] conclusion is hard to swallow. Given the fact that [a motorist] quite clearly ha[s] been seized when his car was pulled over, the return of [his driving papers] hardly manifests a change in status when it was immediately followed by interrogation concerning other criminal activity.

LaFave, *supra*, §9.3(a) at 112 (footnote omitted).

[17] Deputy Newsome testified at the suppression hearing that it was his routine practice to ask permission to search a motorist's car during traffic stops. J.A.22. The appellate court below was obviously aware of Newsome's "routine." *See* Pet.App.18, citing *Ohio v. Retherford*, 639 N.E.2d 498, 503 (Ohio Ct.App. 1994). In *Retherford*, the court stated:

> As a result of Deputy Newsome's testimony in this case, and of testimony in other cases currently pending before this court, it has become clear to us that some police agencies in Ohio are instructing their officers to routinely ask for the consent of individuals stopped for traffic violations to search their vehicles and its contents for drugs, weapons, or large sums of money, even when the officer has little or no suspicion that the occupants of the vehicle are engaged in criminal activity whatsoever, or that the vehicle itself contains any contraband (footnote omitted).

was, as the court below correctly observed, "a fishing expedition for unrelated criminal activity." Pet.App.10. Newsome's questions were not justified by a reasonable belief that contraband was inside respondent's vehicle. Rather, they were part of a carefully scripted routine designed to exploit the vulnerable status of a motorist subjected to a police seizure. Accordingly, Deputy Newsome's conduct exceeded the permissible bounds of a valid traffic stop. Once the purposes for the stop were satisfied, any further interrogation of respondent, absent reasonable cause, was an unlawful and arbitrary continuation of respondent's seizure and thus unreasonable under this Court's precedents.[18]

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[18] The Solicitor General, as *amicus curiae*, claims that the ruling below imposes a "burdensome and mechanical requirement of formal notification upon law enforcement officers." Brief for the United States at 23 (footnote omitted). This is a surprising statement for at least two reasons. First, the requirement of notifying a motorist that the seizure is over is certainly no more "burdensome" or "mechanical" than the self-described "technique" that Deputy Newsome uses whenever he makes a traffic stop. *See Ohio v. Retherford*, 639 N.E.2d at 502:

> [W]hen asked why he felt the need to ask Retherford for her consent to search her vehicle, Deputy Newsome replied, "[m]ore so for any other reason the fact that I need the practice, to be quite honest." Deputy Newsome further testified that, in 1992 alone, he asked for consent to search a vehicle incident to a traffic stop "approximately 786 times . . . give or take a few."

Second, the requirement of notification will only be "burdensome" when officers want to question a motorist, who is otherwise constitutionally entitled to depart the scene, about matters unrelated to the officer's seizure of the motorist. If an officer's conduct and inquiries are reasonably related to the purposes of the stop -- in other words, if the officer obeys the holdings of this Court's precedents -- there will be no additional or "burdensome" notification requirements because the seizure will have been terminated and no arbitrary questions about drugs, guns or contraband will be asked unless there is good reason for such questions.

IV. THE RULING BELOW WILL PROTECT THE PRIVACY, LIBERTY AND SECURITY INTERESTS OF MILLIONS OF INNOCENT MOTORISTS WHO OTHERWISE WOULD BE DELAYED IN THEIR TRAVEL PLANS AND ASKED TO SURRENDER THE PRIVACY OF THEIR AUTOMOBILES AND LUGGAGE WITHOUT GOOD CAUSE

Petitioner and its *amici* suggest that the ruling below is without constitutional basis and imposes a rigid, unnecessary burden on law enforcement officers. In their view, a notification requirement serves no legitimate Fourth Amendment interests. This assessment is gravely mistaken. The ruling below will help discourage what many innocent motorists have already experienced -- an arbitrary, suspicionless accusation and intrusion.

One Ohio appellate court that reviewed the testimony of Deputy Newsome and other law enforcement officers describing how and why they request consent to search the vehicles of motorists stopped for routine traffic violations did not mince words when it commented:

> What is obviously troubling about these cases is that hundreds, and perhaps thousands of Ohio citizens are being routinely delayed in their travel and asked to relinquish to uniformed police officers their right to privacy in their automobiles and luggage, sometimes for no better reason than to provide an officer the opportunity to "practice" his drug interdiction technique. While we recognize the importance of drug interdiction, we are shocked by what we believe to be an unjustified and egregious intrusion upon the privacy rights of the citizens of Ohio.

Ohio v. Retherford, 639 N.E.2d at 503-04. The citizens of

Ohio are not the only innocent motorists who have been subjected to a capricious police practice. Instances of innocent motorists being stopped for minor traffic violations and subjected to police accusation, questioning and search extending far beyond constitutional limits are easy to find:

> George Karnes, [a business man from California was stopped outside Allentown, Pa. for speeding. After issuing a ticket, Trooper Thomas Skrutski] asked to search [Karnes'] car, but Karnes said no . . . . But the trooper didn't let Karnes go. He called K-9 officer Edward Kowalski, who arrived with his drug detection dog about 20 minutes later . . . . [Kowalski] also asked Karnes to allow a search. But Karnes refused, so Kowalski brought out his drug dog. Twice the dog sniffed its way around the car, detecting no drugs. Finally -- two and a half hours after the initial stop -- the troopers let Karnes go.[19]
>
> In Maryland . . . Trooper Hughes pulled over a rental car that he said was speeding [on] Interstate 68. The car carried four black men on their way back from a relative's funeral in Chicago to Washington, D.C. When Hughes asked to search the car, [an occupant] identified himself as a Washington, D.C. public defender who was trying to make a 9:30 a.m. court appearance . . . . Denied permission [to search], the trooper detained the men for nearly an hour while a drug-sniffing dog was summoned. The dog found nothing, and the men were sent on their way with a $105 speeding ticket.[20]

Police videotapes of roadside searches by sheriff deputies of Volusia County, Florida reveal what many innocent motorists have experienced after being stopped for traffic violations that rarely result in tickets being issued:

> The tapes revealed a pattern -- one that fairly represents procedures used on the interstate -- in which deputies stop minority motorists for flimsy reasons, then trick them or coerce them into allowing their vehicles to be searched.
>
> Deputies set up the motorists by using a subtle but sophisticated -- and effective -- psychological tool. They question them in friendly, conversational tones: Where is the motorist going? Where has the motorist been? Whom is the motorist visiting?
>
> After telling them they can leave, the deputies suddenly ask if they are carrying drugs, weapons or explosives and whether they will consent to a search.
>
> Most people want to cooperate with police -- either out of fear or respect. Their inclination is to allow cops to search their vehicles . . . . [One motorist], who is black, calmly answered the officer's questions. There was no obvious reason to suspect her as a drug dealer and no legitimate reason to search her car. The deputy lectured her on the proper use of the emergency lane and told her she was free to go. Then he pulled that oh-by-the-way routine and

[19] Kate Shatzkin & Joe Hallinan, "Highway Dragnets Seek Drug Couriers -- Police Stop Many Cars for Searches," Seattle Times, Sept. 3, 1992.

[20] Mark Pazniokas, "Discrimination by Police Often Hard to Prove," Hartford Courant, May 2, 1994.

> searched her car. [No drugs or cash were found] . . . .
>
> Motorists who stand up for their rights and refuse permission to search, still are detained by deputies. [Another police tape] showed a video in which a security guard, who is black, refused a deputy's request to search his car. The deputy called for a police dog that "alerted" to drugs and the car was searched. No drugs or cash were found.[21]

Although officers often seek consent searches as a part of their "routine" practice or "technique," the experience for the innocent motorist is no routine matter. A consent search by a Maryland state trooper of a car stopped for speeding went as follows:

> "Using a screwdriver and a flashlight, [the trooper] loosened door panels, raised the dashboard, looked into the exhaust pipe, checked the spare tire and inspected under the hood . . . . [The search] took about 30 minutes. [The trooper] found nothing and then called for a trained German shepherd to sniff around. It too found nothing."[22]
>
> Even those who agree to let police search their car may be in for more than they expected. Craig Kirby, a 30-year-old Alabama textile worker, was stopped in July 1990 as he drove on I-10 through Jefferson Davis Parish in southwestern Louisiana. When the officer asked him whether he could search the car, Kirby said: "Fine." The next thing he knew, Kirby was spread-eagled against the side of his car. The officer searched his luggage and trunk and looked under his hood and dashboard. But the search didn't stop there. The officer, Kirby said, made him drive to a gas station, where he had mechanics take apart his spare tire. The officers also disassembled his seats, he said. They found no drugs and told Kirby he was free to go. The ordeal lasted an hour and a half.[23]

Members of this Court have expressed strong disapproval of suspicionless intrusions that may affect thousands or millions of innocent persons.[24] This Court has also acknowledged that many citizens "find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of

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[21] Bo Poertner, "Tapes Show Rights Given Up Readily," Orlando Sentinel, Aug. 13, 1994.

[22] Michael Janofsky, "In Drug Fight, Police Now Take to the Highway," N.Y. Times, Mar. 5, 1995.

[23] Shatzkin & Hallinan, *supra*.

[24] *Acton*, 115 S.Ct. at 2403 (O'Connor, J., dissenting)("[A] suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy considerations"); *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting)("[T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others -- perhaps those with more expansive cars, or different bumper stickers, or different-colored skin -- may escape it entirely"); *cf. Illinois v. Krull*, 480 U.S. 340, 365 (1987)(O'Connor, J., dissenting) (noting a significant difference between an invalid search warrant that targets only one person and a legislature's illegal authorization of suspicionless searches that "may affect thousands or millions and will almost always affect more than one").

travel." *Prouse*, 440 U.S. at 662. If petitioner prevails, millions of innocent travelers may experience, subject to the discretion of the officer in the field, an arbitrary police "technique" that threatens their liberty, privacy, and security every time their vehicle is stopped for a traffic infraction. That result cannot be reconciled with the Fourth Amendment's "most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people." *Acton*, 115 S.Ct. at 2404 (O'Connor, J., dissenting).

CONCLUSION

For the reasons stated above, the judgment of the Ohio Supreme Court should be affirmed.

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Dated: June 4, 1996

(2)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Writ Of Certiorari
To The Ohio Supreme Court

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT, SUGGESTING DISMISSAL OF WRIT AS IMPROVIDENTLY GRANTED

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32pp

QUESTION PRESENTED

In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court held that when a state court cites both state and federal grounds for its decision, this Court would presume the state grounds are not "adequate and independent" enough to preclude review unless the state case contained a "plain statement" that the federal cases "do not themselves compel the result." In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court declined to apply such a conclusive presumption in favor of review to habeas corpus cases. Instead, the Court relaxed the presumption of reviewability to respect the pre-eminent role of state courts in correcting their own errors, to reflect more accurately the state court's intent, to avoid unnecessary costs of review, and to maintain symmetry between this Court's 28 U.S.C. § 1257 jurisdiction and the lower courts' 28 U.S.C. § 2254 jurisdiction.

Should the presumption of reviewability by this Court of direct appeal cases also be relaxed, to further achieve the values animating *Coleman v. Thompson*, and does that warrant dismissal of the writ in this case?

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INTEREST OF THE AMICUS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 9000 attorneys and 30,000 affiliate members, including representatives from every state of the Union. The American Bar Association awards NACDL full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. As part of its mission, NACDL strives to defend individual rights and liberties, whether they are guaranteed by the United States or by one of the fifty states.

This case raises the question whether this Court should adhere to a conclusive presumption of reviewability of certain state court decisions in criminal cases on direct appeal, when that presumption may conflict with the language and context of the state court opinion, may impose substantial costs of additional review on the states, and is unnecessary to further the goal of symmetry between this Court's 28 U.S.C. § 1257 jurisdiction and the federal courts' 28 U.S.C. § 2254 jurisdiction. This is an issue that can – as in this case – have substantial impact upon the state courts' protection of

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[1] The parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court. A copy of their letters giving written consent are being filed with the Court.

individual rights and liberties against government interference and, hence, it is an issue that falls within NACDL's core concerns.

SUMMARY OF ARGUMENT

This year, the Court has once again recognized the right of the states to be free from federal Congressional intrusion, absent a clear Constitutional mandate justifying the federal action. *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996) (overruling holding of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that Congress has power under Interstate Commerce Clause to abrogate states' Eleventh Amendment immunity and subject states to federal court jurisdiction). *Accord United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624 (1995) (Congress exceeded its authority under the Commerce Clause when it enacted the Gun-Free School Zones Act, because gun possession in or near schools is unrelated to commerce or commercial activity).

This year, Congress acknowledged the pre-eminent role of the state courts in adjudicating constitutional issues in state criminal cases, by passing habeas corpus legislation limiting the jurisdiction of the lower federal courts to review such decisions. *E.g.*, 28 U.S.C. § 2254(b) (codifying exhaustion requirements); 28 U.S.C. § 2254(d) (requiring deference to state court adjudication of federal constitutional issues); 28 U.S.C. § 2254(e) (requiring deference to state court adjudication of factual issues); 28 U.S.C § 2244(d)(1) (new statute of limitations); 28 U.S.C.

§ 2253(c) (limiting appellate review absent certificate of appealability issued by circuit judge).

This Court in *Coleman v. Thompson*, 501 U.S. 722 (1991), similarly acknowledged the critical role of the state courts in correcting their own errors, including constitutional errors, in state criminal cases. *Coleman* accomplished this by rejecting an absolute presumption of federal reviewability on habeas corpus in cases where federal grounds are discussed in a state court decision. *Id.* at 735-36.

NACDL respectfully suggests that *Michigan v. Long*, 463 U.S. 1032 (1983), with its conclusive presumption of reviewability on direct review of certain state court decisions, is now out of step. A conclusive presumption of reviewability fails to respect the state court's intent where the state court's language and a well-established state rule of interpretation (here, Ohio's "syllabus rule") show that the state court meant to base its decision on state grounds (even without a "plain statement" in the words prescribed by *Michigan v. Long*). A conclusive presumption of reviewability also fails to achieve the goal of saving unnecessary costs of review in this context: it can trigger further state review under state law. Further, a conclusive presumption fails to achieve the goal of symmetry between this Court's 28 U.S.C. § 1257 jurisdiction and the federal courts' 28 U.S.C. § 2254 jurisdiction – granting parties no greater access to federal review via § 2254 than § 1257 – where no federal review at all is available under § 2254. That is precisely the case here, as we explain below.

Making *Michigan v. Long*'s presumption of reviewability a rebuttable one would enable this Court to weigh a factor, such as a state rule of interpretation which suggests the state court's decision was based on independent state grounds, in a particular case. This is especially important under 28 U.S.C. § 1257, where the adequate and independent state ground rule precluding review of a state high court decision is jurisdictional, and an erroneous grant of jurisdiction would implicate this Court's power to act. The fact that the ordinary presumption of this Court is against jurisdiction, that the general rule is one of constitutional avoidance, and that the presumption of reviewability is supposed to accord deference to state *court* determinations (not state prosecutorial determinations), also support a relaxation of the presumption of reviewability here.

Amicus therefore respectfully suggests that the presumption of reviewability should be *rebuttable* where, as here, this Court considers reviewing a state court decision that cites state and federal law, but lacks a *Michigan v. Long* "plain statement" that the state law holding is adequate and independent of federal law. The presumption is rebutted in this case because the state court's language, when construed in light of a clear and well-established state court rule of interpretation, Ohio's "syllabus" rule, shows that the Ohio Supreme Court intended to base its decision on independent state grounds. The writ should therefore be dismissed. Alternatively, given the points we raise, amicus suggests vacating the state court's judgment and remanding for clarification.

ARGUMENT

I. THE DEVELOPMENT OF THE ADEQUATE AND INDEPENDENT STATE GROUND DOCTRINE DEMONSTRATES THAT THE PRESUMPTION OF REVIEWABILITY IN HABEAS CORPUS CASES IS NEITHER IRREBUTTABLE NOR UNIVERSALLY APPLICABLE

A state court judgment based on independent and adequate state grounds is insulated from federal review. *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551 (1940); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

In *Michigan v. Long*, 463 U.S. 1032, however, this Court created a presumption in favor of Supreme Court review following direct appeal when a state court cites both federal and state law in support of its holding. The state court must take the affirmative step of stating that it has cited federal decisions only for "the purpose of guidance" on state law to avoid this presumption:

> [W]hen, as in this case a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, *we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.* If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion *that the federal cases are being used only for the purpose of guidance, and do not*

> *themselves compel the result that the court has reached.*

Id. at 1041 (emphasis added). This presumption assumes that there are no independent and adequate state grounds when the state court does not clarify that its state holding is independent of the cited federal cases. *Id.* at 1042.

Notably, however, this Court in *Michigan v. Long*, 463 U.S. 1032, also recognized that there may be times when such a conclusive presumption is unwarranted: "There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the *appropriate action.*" *Id.* at 1041, n.6 (emphasis added).

Thereafter, in *Harris v. Reed*, 489 U.S. 255 (1989), this Court applied *Michigan v. Long*'s "plain statement" rule to cases pending on federal habeas corpus review. In *Coleman v. Thompson*, 501 U.S. 722, 734-35, this Court reiterated the presumption's applicability to the question of independent and adequate state grounds for procedural default on habeas corpus review: "In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." *Id.*

Coleman v. Thompson, however, also made clear that a conclusive presumption of federal court reviewability is not always applicable in habeas cases. As this Court explained in *Coleman*: "[W]e will not impose on state courts the responsibility for using particular language in

every case in which a state prisoner presents a federal claim – *every state appeal*, every denial of state collateral review – in order that federal courts might not be bothered with reviewing state law and the record in the case." *Id.* at 739 (emphasis added). The presumption of reviewability did not apply in *Coleman*, notwithstanding the absence of a "plain statement" in the state court's opinion that its state law holding was independent and adequate, since the Virginia Supreme Court's dismissal of review "fairly appear[ed]" to rest primarily on state law. *Coleman*, 501 U.S. at 740-41.

Similarly, this Court has held that a conclusive presumption of reviewability does not apply to unexplained summary dispositions by state courts in habeas corpus cases. *Ylst v. Nunnemaker*, 501 U.S. 797, 804-05 (1991) (adopting rebuttable, "look-through" presumption for determining whether independent and adequate state grounds barred federal habeas review where final state court's order is unexplained).

Thus, while this Court has retained *Michigan v. Long*'s presumption in favor of this Court's jurisdiction over dissent, *see, e.g., Arizona v. Evans*, 514 U.S. ___, 115 S.Ct. 1185, 1197 (1995) (Ginsburg, J., with whom Stevens, J., joins, dissenting), this Court has also made clear that in habeas corpus cases, the presumption is neither universally applicable nor conclusively irrebuttable. This case presents the question whether the presumption of reviewability ought to have equivalent exceptions in direct appeal cases.

II. THE VALUES ANIMATING THE *MICHIGAN V. LONG* PRESUMPTION OF REVIEWABILITY ON DIRECT APPEAL ARE ILL-SERVED IN MANY CASES BY A CONCLUSIVE PRESUMPTION

A. The Goals of the Presumption of Reviewability

The *Michigan v. Long* presumption seeks to achieve several goals. It aims to reflect accurately the state court's intent in most cases. *Coleman v. Thompson*, 501 U.S. 722, 737; *Michigan v. Long*, 463 U.S. 1032, 1041 ("when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so"). *See Harris v. Reed*, 489 U.S. 255, 276 (Kennedy, J., dissenting) (citing *Michigan v. Long* and questioning whether the "most reasonable explanation" for a state court's decision to cite a procedural bar is really that the court intended to ignore the bar).

The presumption is supposed to avoid unnecessary costs of review. *Coleman v. Thompson*, 501 U.S. 722, 737 (a conclusive presumption, like that of *Michigan v. Long*, 463 U.S. 1032, should avoid the costs of excessive inquiry where a per se rule will achieve correct results in almost all cases). *Accord Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977).

The presumption is also supposed to preserve symmetry between the scope of this Court's § 1257 review and the scope of the federal courts' § 2254 review. *Coleman v. Thompson*, 501 U.S. 722, 730-31.

B. The Goal of Accurately Reflecting the State Court's Intent is Ill-Served by a Conclusive Presumption of Reviewability Where a State Rule of Interpretation Shows that the State Court Meant to Base its Decision on State Law

The goal of accurately reflecting the state court's intent is ill-served by a conclusive presumption of reviewability where a state rule of interpretation shows that the state court intended to rely on state law (even absent a *Michigan v. Long* "plain statement" to that effect). That is precisely the case here. Ohio's clear and long-standing "syllabus rule" provides that the holding lodged in the syllabus of the Ohio Supreme Court's decision constitutes the holding of the case – and the only holding of the case. *Williamson Heater Co. v. Radich*, 128 Ohio St. 124, 126, 190 N.E. 403, 404 (1934). *See Ohio v. Gallagher*, 425 U.S. 257, 259 (1976) ("We also note that, except for per curiam opinions, it is the settled rule in Ohio that its Supreme Court speaks as a court only through the syllabi of its cases.") (citations omitted). In *State v. Robinette*, syllabus number 2 states, in full:

> The right, guaranteed by the federal *and Ohio Constitutions*, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

Id., 73 Ohio St.3d 650, 650-51, 653 N.E.2d 695, 696 (1995) (emphasis supplied). Since the syllabus states that the

court rests its decision on the Ohio Constitution as well as the U.S. Constitution, and since the Ohio syllabus rule provides that the syllabus contains the holding of the case, the conclusion is inescapable that the Ohio Supreme Court meant to hold that it relied in equal measure on its own constitution and the U.S. Constitution for its holding.[2]

Ohio is not unique in having a state rule of interpretation explaining how to determine the content of the state court's holding. Other states also have rules of interpretation designed to clarify the holdings of their decisions. Some are a clear response to the *Michigan v. Long* "plain statement" rule. The New Hampshire Supreme Court, for example, has stated: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our

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[2] The fact that the state court based its decision concerning the scope and duration of a traffic stop on state law is unexceptional. Other state courts have based similar conclusions on state law. *See, e.g., State v. Claxton*, ___ P.2d ___, 1996 WL 185759 (Or. App. Apr. 17, 1996) at *2 (state law allowing police to "investigate and verify" identity of person who fails to produce license may provide independent basis for seeking consent to search, which is normally precluded in a routine traffic stop that is limited in scope and duration to the traffic problem that caused the stop, if officer was subjectively motivated by purpose of determining identity); *State v. Dominguez-Martinez*, 321 Or. 206, 212, 895 P.2d 306, 309 (Or. 1995) (when police stop a vehicle for a traffic violation, they may investigate only that violation unless some independent basis for broadening the scope of the stop is shown; based on state statute).

results bound by those decisions." *State v. Ball*, 124 N.H. 226, 233, 471 A.2d 347, 352 (1983). Similarly, the Oregon Supreme Court has said: "Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines." *State v. Kennedy*, 295 Or. 260, 267, 666 P.2d 1316, 1321 (1983). And the Washington Supreme Court has explained that when it interprets a state constitutional provision first, prior to addressing an analogous federal claim, it does so "to develop a body of *independent* jurisprudence because considering the United States Constitution first would be premature." *State v. Johnson*, 128 Wash.2d 431, 909 P.2d 293, 301 (1996) (emphasis added) (citation omitted).[3]

The goal of accurately reflecting the state court's intent is not furthered by a conclusive presumption of

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[3] *See also People v. Pettingill*, 145 Cal. Rptr. 861, 21 Cal.3d 231, 578 P.2d 108, 118 (1976) ("The construction of a provision of the California Constitution remains a matter of California law regardless of the narrower manner in which decisions of the United States Supreme Court may interpret provisions of the federal constitution. . . . Indeed our Constitution expressly declares that 'rights guaranteed by the Constitution are *not dependent* on those guaranteed by the United States Constitution.' ") (citing Cal. Const. art. 1, § 24) (emphasis added); *State v. Opperman*, 247 N.W.2d 673, 674 (1976) ("This court is the final authority on interpretation and enforcement of the South Dakota Constitution. We have always assumed the *independent* nature of our state constitution regardless of any similarity between the language of that document and the federal constitution.") (emphasis added).

reviewability where, as here, a state rule of interpretation shows that the state court meant to base its decision on adequate and independent state grounds, even absent a *Michigan v. Long* "plain statement" in each case to that effect.[4] A rebuttable presumption, which would allow this Court to consider a state rule of interpretation such as Ohio's syllabus rule, promises more reliable results when deciding the nature of the state court's holding. Giving consideration to such a state court rule of interpretation also comports with the notion that the context in which language is used is critical to determining the language's meaning. *See Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, 506 (1995) ("the meaning of statutory language, plain or not, depends on context") (citations omitted).

C. The Goal of Saving the Costs of Unnecessary Review is Ill-Served by a Conclusive Presumption of Reviewability Where a State Rule of Interpretation Shows that the State Court Meant to Base its Decision on State Law

This Court has made clear that the *Michigan v. Long* presumption, like any presumption, is designed to

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[4] Even the brief amicus curiae file by Americans for Effective Law Enforcement Inc., candidly acknowledges that the state court's language certainly makes it sound like it was basing its decision on state law. *Brief Amicus Curiae of Americans for Effective Law Enforcement Inc.*, p. 4 ("The court below. . . . ruled that the right guaranteed by the federal and state (Ohio) constitutions, to be secure in one's person and property, requires that citizens stopped for traffic offenses be clearly informed by the detaining officer as to when they are free to go after a valid detention . . . "); *id.* pp. 7-8 (the Ohio Supreme Court "has elevated a police practice to the position of a federal *and state* constitutional right") (emphasis added).

minimize the costs of unnecessary, individualized review. *Coleman v. Thompson*, 501 U.S. 722, 737. While any per se rule concerning whether to accept review will reduce the costs to this Court of determining reviewability, a conclusive presumption in favor of reviewability promises to raise costs to the states, where a state court meant to base its decision on state law.

Michigan v. Sitz, 496 U.S. 444 (1990), provides an example of this problem. In *Sitz*, this Court held that an initial stop of a motorist at a roadside sobriety checkpoint by Michigan police did not violate the Fourth Amendment. This Court reversed a lower Michigan appellate court decision, 170 Mich. App. 433, 429 N.W.2d 180 (1988), which had affirmed the Wayne County Circuit Court's order permanently enjoining the checkpoint program on the grounds that it violated the Fourth Amendment *and* the Michigan Constitution. On remand from *Michigan v. Sitz*, 496 U.S. 444, which reversed the state court's decision on federal grounds, the Michigan Court of Appeals reached the same conclusion that it had reached before: sobriety checkpoints violate the state constitution. *Sitz v. Dept. of State Police*, 193 Mich. App. 690, 485 N.W.2d 135 (1992), *aff'd*, 443 Mich. 744, 506 N.W.2d 209 (1993). *See generally Arizona v. Evans*, 514 U.S. ___, 115 S.Ct. 1185, 1197 (Ginsburg, J., dissenting, with whom Stevens, J., joins) (comparing 14.3% rate of reinstatement of decisions on state grounds by state courts on remand from this Court pre-*Long*, with 26.7% rate of reinstatement post-*Long*) (citation omitted). This shows that the *Long* presumption may reduce the costs of determining reviewability by this Court, but does so by increasing the costs of judicial inquiry by the state courts.

Similarly, in *South Dakota v. Neville*, 459 U.S. 553 (1983), a pre-*Long* decision, this Court held that admission into evidence of a driver's refusal to take a blood-alcohol content test did not violate the Fifth Amendment right against self-incrimination. This Court accepted review despite the fact that the state court below had framed the question as "whether SDCL 32-23-10.1 is a violation of Neville's federal and state constitutional privilege against self incrimination," and had held "that evidence of the accused's refusal to take a blood test violates the federal and state privilege against self-incrimination . . . " *State v. Neville*, 312 N.W.2d 723, 725-26 (1981) (citing U.S. Const. amend. V and S.D. Const. art. VI, § 9). This Court had also accepted review despite a clear and well-established state rule of interpretation that South Dakota "assume[s] the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution." *State v. Opperman*, 247 N.W.2d 673, 674. On remand, the South Dakota Supreme Court held – solely on state grounds – that admission of the defendant's refusal to submit to a blood-alcohol content test was inadmissible. *State v. Neville*, 346 N.W.2d 425 (1984) ("Since Neville was not fully informed of this consequence [that his refusal to submit to the test would be admissible], he did not voluntarily, knowingly and intelligently waive his constitutional protection of due process and prohibition against self-incrimination."). This shows that this Court's failure to consider clear, well-established state rules of interpretation when deciding whether a state decision is based on independent grounds can also increase the costs of judicial inquiry by the states.

A conclusive presumption of reviewability where the state court has indicated that its decision was based on state law – *albeit* not in *Michigan v. Long*'s prescribed words – therefore fails to avoid the costs of excessive inquiry. *See Coleman v. Thompson*, 501 U.S. 722, 737. Both the *Long* presumption and the failure to consider state rules of interpretation have increased such successive inquiry, and the cost falls on the state courts.

This may simply be the cost of the problem that state courts misunderstand the "plain statement" rule, leaving the basis of their decisions unclear to this Court. The confusion in the state courts, however, should not be ignored. That problem actually militates in favor of revisiting the *Michigan v. Long* rule. *See Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (reversing prior 11th Amendment precedent: "Since it was issued, [*Pennsylvania v.*] *Union Gas* [*Co.*, 491 U.S. 11 (1989)] has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision.").

Amicus suggests that tempering the *Michigan v. Long* presumption of reviewability with *Coleman v. Thompson*'s recognition that the presumption is neither universally applicable nor necessarily conclusive could go a long way to easing the costs placed on state courts by the current strict presumption of reviewability on direct appeal. *Cf. Coleman v. Thompson*, 501 U.S. 722, 739 ("A broad presumption would also put too great a burden on the state courts.").

D. The Goal of Symmetry Between this Court's § 1257 Jurisdiction and the Lower Courts' § 2254 Jurisdiction is Ill-Served by a Conclusive Presumption of Reviewability Where Habeas Review of the Issue is Unavailable

Michigan v. Long's presumption of reviewability is also supposed to provide symmetry between this Court's 28 U.S.C. § 1257 jurisdiction and the federal courts' 28 U.S.C. § 2254 jurisdiction – granting parties no greater access to federal review via one route, particularly § 2254, than the other. As this Court explained in *Coleman v. Thompson*, 501 U.S. 722, 730-31, "Without the [adequate and independent ground] rule [in habeas], a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this court's jurisdiction and a means to undermine the state's interest in enforcing its laws."[5] A presumption in favor of jurisdiction under § 1257 undermines this goal where federal habeas review of the issue is completely unavailable.

That is precisely the case here. The issue on which review was granted arises under the Ohio Constitution's search and seizure provision and the Fourth Amendment,

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[5] *See also id.* at 732 ("In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.").

and is of practical importance to the criminal case only because of the exclusionary rule remedy. In *Stone v. Powell*, 428 U.S. 465, 482, 484 (1976), however, this Court held that the *Mapp v. Ohio*, 367 U.S. 643 (1961), exclusionary rule remedy is generally unenforceable on habeas corpus.[6] Since the exclusionary rule remedy is generally unenforceable under 28 U.S.C. § 2254, the goal of symmetry is undermined – not served – by a conclusive presumption of reviewability of exclusionary rule claims on direct review under § 1257.

III. A CONCLUSIVE PRESUMPTION OF REVIEWABILITY IS LEAST JUSTIFIED WHERE, AS HERE, REVIEW IMPROPERLY GRANTED PRESENTS A JURISDICTIONAL DEFECT, NOT JUST A PRUDENTIAL ISSUE

The bar on this Court's review of a state high court's decision on direct appeal, where that decision rests on adequate and independent state grounds, is jurisdictional. As this Court has explained: "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729. *See also id.* at 730 ("When this Court reviews a state court

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[6] The exception, of course, is where "the State has [not] provided an opportunity for full and fair litigation" of that claim. *Stone v. Powell*, 428 U.S. 465, 494-95.

decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do."); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Application of the adequate and independent ground doctrine to bar review of a state court decision on habeas corpus, however, is not a jurisdictional matter. It is a prudential limit designed to foster comity and federalism. *Coleman v. Thompson*, 501 U.S. 722, 730 (distinguishing basis for adequate and independent state ground rule on federal court's habeas review from basis for the rule on this Court's § 1257 review on direct appeal: "In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism"); *id.* at 731-32 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him. . . . In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases."); *id.* at 765 (Blackmun, J., dissenting, joined by Marshall, J., and Stevens, J.) ("It is well settled that the existence of a state procedural default

does not divest a federal court of jurisdiction on collateral review. . . . Rather, the important office of the federal courts in vindicating federal right gives way to the States' enforcement of their procedural rules to protect the States' interest in being an equal partner in safeguarding federal rights.") (citation omitted).[7]

A presumption necessarily entails some measure of error. *Coleman v. Thompson*, 501 U.S. 722, 737 ("The presumption [of *Michigan v. Long*], like all conclusive presumptions, is designed to avoid the costs of excessive inquiry where a per se rule will achieve the correct result in *almost all* cases") (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16, for rule: "Per se rules . . . require the Court to make broad generalizations . . . Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."). *See also Coleman v. Thompson*, 501 U.S. 722, 737 ("We accept errors in those small number of cases where there was nonetheless an independent and adequate state ground in exchange for a significant reduction in the costs of inquiry.").

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[7] The non-jurisdictional nature of the independent and adequate state procedural default rule in habeas cases is bolstered by recent amendments to 28 U.S.C. § 2254 bearing on the related procedural issue of exhaustion. Subsection (b)(2) now expressly states: "An applicant for a writ of habeas corpus *may be denied on the merits*, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." (Emphasis added).

Jurisdiction implicates the very power of this Court to act. *Carlisle v. United States*, ___ U.S. ___, 1996 WL 202555 (Apr. 29, 1996) (Ginsburg, J., concurring, with whom Souter, J., and Breyer, J., join) (defining subject matter jurisdiction as power of court to act). Comity and federalism concerns do not.

A conclusive presumption that errs in favor of reviewability is therefore especially unwarranted where, as here, jurisdiction arises under § 1257, because it could unduly expand this Court's jurisdiction, *i.e.*, the power of this Court to act. *Carlisle v. United States*, ___ U.S. ___, 1996 WL 202555, * 5 (district court lacks power to act on motion for judgment of acquittal filed one day outside time limits: "Assuming *arguendo* that these contentions [predicting numerous needless appeals of habeas proceedings as a result of decision] are accurate we cannot permit them to alter our analysis, for we are not at liberty to ignore the mandate of Rule 29 in order to obtain 'optimal' policy results."). *See Berman v. United States*, 378 U.S. 530 (1964) (summary affirmance of dismissal of appeal filed one day late).

IV. THE PRESUMPTIONS AGAINST FEDERAL COURT AND SUPREME COURT JURISDICTION, OF CONSTITUTIONAL AVOIDANCE, AND THE GOAL OF COMITY ALSO COUNSEL AGAINST A CONCLUSIVE PRESUMPTION OF REVIEWABILITY HERE

The ordinary presumption in federal court is against jurisdiction. *See Delaware v. Van Arsdall*, 475 U.S. 673, 692 (1986) (Stevens, J. dissenting); *King Iron Bridge & Mfg. Co. v. County of Otoe*, 120 U.S. 225, 226 (1887). This obviously

counsels against a conclusive presumption of reviewability by this Court.

In addition, the petitioner has the burden of showing that this Court can, and should, exercise jurisdiction. Sup. Ct. R. 10. *Cf. Michigan v. Long*, 463 U.S. 1032, 1054 (Blackmun, J., concurring) (noting "increased danger of advisory opinions in the Court's new approach"). This also counsels against a conclusive presumption of reviewability by this Court.

Further, the general rule in this Court is one of constitutional avoidance. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). *See generally Peretz v. United States*, 501 U.S. 923, 929-30 (1991) ("[t]he principle of *constitutional avoidance* led us to demand clear evidence that Congress actually intended to permit magistrates to take on a role that raised a *substantial constitutional question.*") (emphasis added) (citation omitted)[8]; *Lyng Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46

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[8] In fact, this Court in *Peretz v. United States*, 501 U.S. 923, made clear that where, as here, the government seeks to deprive an individual of an important privilege or right, the principle of constitutional avoidance is especially appropriate: "The requirement that Congress express its intent clearly was also appropriate because the Government was asking us in *Gomez* to construe a general grant of authority to authorize a procedure that deprived an individual of an important privilege, *if not a right.*" *Peretz*, 501 U.S. 923, 930. This is perhaps the converse of Justice Stevens' suggestion to construe broadly this Court's jurisdiction when a constitutional right is implicated. *Cf. Michigan v. Long*, 463 U.S. 1032, 1068 (Stevens, J., dissenting) ("I believe that in reviewing the decisions of state courts, the primary role of this court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.").

(1988); *West v. Aikins*, 487 U.S. 42, 49 n.8 (1988); *Jean v. Nelson*, 472 U.S. 846 (1985); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) ("[t]his Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' "). This principle militates against a conclusive presumption of reviewability in cases like this, where a federal constitutional question is presented and might unnecessarily be decided.

Federalism is the core concern underlying the adequate and independent state ground line of decisions. *Coleman v. Thompson*, 501 U.S. 722, 725 ("This is a case about federalism."). But which way does federalism cut? This Court has generally described the value of federalism in the adequate and independent state ground context as respect for state courts – not deference to state prosecutors. *Michigan v. Long*, 463 U.S. 1032, 1040 ("Respect for the *independence of state courts*, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this *respect for state courts*, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review . . . ") (emphasis added); *id.*, 463 U.S. 1032, 1041 ("This approach obviates in most instances the need to examine state law in order to decide the nature of the state court decision. . . . We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded

by federal interference. . . . "); *id.* at 1041 (" 'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.' ") (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).

A conclusive presumption of reviewability in this case – in the face of the Ohio Supreme Court's statement in the syllabus of its decision which comprises its holding that it was relying on both the state and U.S. Constitutions – may grant deference to the Montgomery County, Ohio, Prosecuting Attorney. But it undermines deference to the Ohio Supreme Court. The presumption of reviewability should not stand as a conclusive wedge between the state's highest court, which stated in its holding that it was relying upon state law, and a county prosecutor who lost in state court. Federalism, thus, also counsels against a conclusive presumption of reviewability.

V. THIS COURT SHOULD HOLD THAT *MICHIGAN V. LONG*'S PRESUMPTION OF REVIEWABILITY OF DIRECT APPEAL CASES, LIKE *COLEMAN V. THOMPSON*'S PRESUMPTION OF REVIEWABILITY ON HABEAS, IS NEITHER IRREBUTTABLE NOR UNIVERSALLY APPLICABLE – IT IS REBUTTED OR INAPPLICABLE WHERE, AS HERE, A WELL-ESTABLISHED STATE RULE OF INTERPRETATION SHOWS THAT THE STATE GROUND OF DECISION IS ADEQUATE AND INDEPENDENT

This Court has stated, "Our willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases, because in such cases "correction through

legislative action is practically impossible." ' " *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 1127 (numerous citations omitted). Amicus respectfully urges this Court to reconsider *Michigan v. Long*'s presumption of reviewability of federal constitutional claims arising on direct review in state cases, given the presumption's failure to achieve its stated goals, and to decide whether other, "appropriate action," in the words of *Michigan v. Long*, 463 U.S. at 1041, n.6, is needed. Amicus respectfully suggests that this Court should then hold that, following *Coleman v. Thompson* and *Ylst v. Nunnemaker*, the presumption of reviewability has exceptions, and is subject to rebuttal, on review of state court decisions on direct appeal – just as the presumption has exceptions and is subject to rebuttal on habeas review. Amicus also suggests that this Court should conclude that the presumption is rebutted where, as here, a clear and well-settled state rule of interpretation shows that the state court meant to base its holding on independent state law. For the reasons explained above, amicus also respectfully suggests that this Court abandon the presumption of reviewability completely where *Stone v. Powell* bars review of the exclusionary rule issue on habeas.

VI. CONCLUSION

This Court should dismiss the writ as improvidently granted on the ground that the Ohio Supreme Court's decision, lodged in its syllabus and based on the Ohio Constitution, when interpreted in light of Ohio's syllabus rule, provides an adequate and independent state ground of decision. Alternatively, given the points we raise, amicus suggests vacating the state court's judgment and

remanding for clarification of its decision. *Arizona v. Evans*, 514 U.S. ___, 115 S.Ct. 1185, 1190 n.3; *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) (vacating state court judgment and remanding for further proceedings as state court might deem appropriate to clarify ground of its decision).

Respectfully submitted,

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